On August 1, 1957, the Petitioner Machinists was certified by the Board as the collective bargaining representative of certain of Cadillac's service employees at Wilshire and Bixel [JA Vol. III, pp. 1103, 1104]. On November 6, 1958, Petitioner "Painters" was certified by the Board as the Collective Bargaining Representative of Cadillac's painters at Wilshire and Bixel [JA Vol. 3, pp. 1107, 1109]. Successive agreements were negotiated between the parties, the last being entered into on December 1, 1964 [JA Vol. II, p. 527, GC-6A]. By its terms the agreement cantinued in full force and effect without change until December 1, 1967.

On January 12, 1965, General Motors advised the Machinists and Painters Unions by letter that it was in the process of reconsidering its policy of operating its own Cadillac agencies and that it was contemplating the transfer of Bixel and Wilshire to independent dealers. On May 10, 1965, General Motors advised the Unions by letter that Thomas Cadillac, Inc. and Lou Ehlers, Cadillac, Inc. would take over the Bixel and Wilshire branches respectively on June 1, 1965 [JA Vol. III, p. 1081]. Thereafter, the Unions, by their attorneys, addressed letters to Thomas and Ehlers.

(1) Correspondence With Ehlers.

By letter dated May 19, 1965, the Unions requested Ehlers to meet with their representative, stating *inter alia:*

"The employees at the Wilshire Branch and the above unions are concerned that this change will not adversely affect them.

> "In order to clarify the rights of the employees and above unions and to deal with any questions that may arise on the part of all parties concerned, we are requesting a meeting at your very earliest convenience." [JA Vol. II, p. 642].

By letter dated June 3, 1965, the Union attorney wrote to Respondent Ehlers' legal counsel and stated *inter alia:*

> "You have previously advised that the employer does not consider himself bound by the terms of the existing bargaining agreement between the Machinists and Painters Union and Cadillac Motor Car Division of General Motors Corp. . . . At this time the Union requests that your client arbitrate the question as to whether the existing contract is binding upon him." [JA Vol. II, p. 644].

On June 7, 1965, counsel for Respondent Ehlers wrote to the Unions' legal counsel and in reply stated:

> "Please be advised, in reply to your letter of June 3, 1965, that Lou Ehlers declines your request for arbitration." [JA Vol. II, p. 45, GC, 7-(c)].

On June 8, 1965, the Painters Union, through its legal counsel, made a similar request for arbitration [JA Vol. II, pp. 647-648, GC 7 (e)], and on June 14, 1965, Ehlers' counsel similarly declined arbitration [JA Vol. II, p. 648, GC 7 (f)]. Respondent Ehlers at no time recognized or bargained with the Unions [JA Vol. I, p. 18].

(2) Correspondence With Thomas.

On May 17, 1965, the Painters Union, through its counsel, communicated with Thomas stating *inter alia:*

> "We have been advised by Cadillac that your company will be assuming the operations at the West Seventh Street branch on June 1, 1965.
>
> "The employees at the West Seventh Street Branch and the above unions are concerned that this change of ownership will not adversely affect them.
>
> "In view of the history of a high level of dealings and a friendly relationship with your business concern, it is assumed by the above unions that your company will recognize and bargain with the above unions.
>
> "In order to clarify the rights of the employees and the above unions, and to deal with any questions that may arise on the part of all parties concerned, we are requesting a meeting at your very earliest convenience. This meeting should include a representative of your company, the Painters Union and myself, the Machinists Union and its attorney, Herb Ansell." [JA Vol. II, pp. 720-721].

On May 18, 1965, the Painters Union through its legal counsel, communicated with Respondent Thomas and stated that it had learned Thomas was requesting the General Motors employees at Bixel to sign applications for employment with him. The letter again suggested the need for a meeting with Union representatives [JA Vol. II, p. 722].

On June 8, 1965, the Machinists Union again requested that Respondent Thomas arbitrate the question

of the contract's applicability and on June 9, 1965, the Painters Union did likewise [JA Vol. II, pp. 723-725].

Respondent Thomas failed to respond to any of the requests.

(3) The Employee Staff Prior to and Following the Transfer of Ownership.

Shortly prior to May 28, 1965, General Motors both at Wilshire and at Bixel had a staff of new and used car salesmen, service employees, and office and supervisory employees [JA Vol. II, pp. 714-719, GC-9, 10, 11]. In addition, General Motors owned certain personalty both tangible and intangible, at both Wilshire and Bixel, used in connection with its operations [JA Vol. II, pp. 519, 541, 727, 751, 792, GC-3(a), 14(a) and 14(b)].

As of May 28, 1965, General Motors operated complete facilities for the sale and service of new and used Cadillac motor cars at both Wilshire and Bixel [JA Vol. I, pp. 203, 273].

Just prior to May 28, 1965, General Motors, at Wilshire employed 39 service employees represented by the Machinists, and three employees represented by the Painters Union [JA Vol. I, p. 153, GC-10; JA Vol. II, p. 715]. Of the former, all but one were members of the Machinists and in the Painters category all were members [JA Vol. I, pp. 154-155].

In May, 1965, General Motors at Bixel employed 69 service employees represented by the Machinists and six service employees represented by the Painters Union [JA Vol. I, p. 155; JA Vol. II, p. 714, GC 11]. In the Machinists classification, all were members of the Union except two while in the Painters classification, all were members except one [JA Vol. I, pp. 154-155].

(4) The Sale to Ehlers and Thomas and the Commencement of Operations.

Commencing in March, 1965, both Thomas and Ehlers began negotiating with General Motors relative to procuring a franchise for the West Seventh Street and Wilshire Branches respectively, and purchasing certain designated assets of General Motors at said locations. During those negotiations, both Ehlers and Thomas were advised that a Labor Agreement was in existence between General Motors and Petitioner [JA Vol. I, pp. 164, 339]. On May 11 and 12, 1965, General Motors and Thomas and Ehlers respectively executed Buy and Sell Agreements and the Franchise Agreement, the details of which are set forth in the Trial Examiner's Opinion [JA Vol. I, pp. 20-23]. Essentially, the control retained by General Motors as to the means by which their automobiles would be distributed through the dealerships was so great as to afford it the power to prescribe the precise manner by which those dealerships would be operated and to terminate the franchise agreements with very little restriction at any time it desired. The Trial Examiner found the effect of the transfers in this regard to be as follows:

> "The employing industry as it existed before the acquisitions of the Respondent employers consisted of the operation of the enterprises for the sale of Cadillac motor vehicles, parts and accessories, and the service of such vehicles at 1076 West Seventh Street and 5151 Wilshire Boulevard, Los Angeles, California. After the successions these enterprises were continued at the same locations without substantial change, with the performance of substantially the same work by former

> General Motors employees. Any deviations from the precise practices or procedures of General Motors effected by the Respondent employers when they assumed operations were not of such a nature as to destroy the continuity and identity of the employing enterprise or alter the basic similarity of the Respondent employers' operations from those of General Motors. Moreover, by the Direct Dealers Selling Agreement, General Motors assured a continuation of operations of the two branches along lines compatible with General Motors directions and prior policies. The employing enterprise remained as before the acquisitions, i. e., the Sale of Cadillac motor vehicles, parts and accessories and the service of such vehicles. The employing structure remained the same." [App. C, pp. 40-41].

Notwithstanding the attempts made by Petitioners to negotiate with the Companies concerning the effects of the sale upon their members, the Respondents proceeded unilaterally to hire its new work force by resort to newspaper advertising and other means.

All of the service employees employed by General Motors in the contract unit at the Seventh Street branch were interviewed for employment by Thomas' service manager, Lloyd Coats, and each upon request submitted applications for employment. Out of sixty-three employees hired for the service department, sixteen were former General Motors employees; one had been in the Painters unit and the others in the Machinists. Two General Motors employees were disqualified from employment because they had reached the age of sixty-

four. According to La Rue Thomas, employees were hired on the basis of their ability.

Out of a service supervisor's staff of seven, on June 7, 1965, three had been service supervisors previously at that location for General Motors. A used car salesman for General Motors became an assistant used car manager for Respondent Thomas and the General Motors supervisor of accounting became Respondent Thomas' business manager. Of the twenty-five new and used car salesmen employed on June 1, 1965, by Thomas, fifteen to seventeen were employed previously in that capacity by General Motors [JA Vol. III, p. 878].

Since June 1, 1965, Respondent Thomas has operated the Bixel branch and has been engaged in substantially the same business operation as formerly engaged in at such branch by General Motors.

Lloyd Coats, Service Manager for Respondent Thomas, testified in his deposition, as follows: that he did all the hiring for Thomas, that he interviewed approximately 100 employees, including all of the former General Motors employees; that the standards he applied were loyalty, honesty, and a good mechanical background; that none of the former General Motors employees failed to meet these standards; that with the exception of three employees who he disqualified because of age, he couldn't recall any other specific factor that disqualified any of the General Motors employees for hire [JA Vol. III, pp. 819-820].

At the Wilshire branch, all of the service employees working for General Motors made application for jobs and were reviewed for hire by Irving Graham, who became service manager under Ehlers (JA Vol. I, p. 24].

The stated object was to select the most competent and satisfactory persons. Of the thirty-five service employees employed by Ehlers in June, Irving Graham hired eleven former General Motors employees. Graham, in his deposition, testified as follows: that the General Motors mechanics on the payroll as of May 28, 1965, had all received training at General Motors School; that he received prior to May 28, 1965, some complaints from customers about the quality of service work performed but after investigation, he determined that a large number of those lacked any merit; that it is extremely common to receive some number of complaints in the automotive field; that the percentage of complaints which he determined to have merit after investigation was less than he encountered at the Seventh Street location; that the eleven General Motors employees he invited to work at Ehlers were in general more "versatile" and had "more background experience with Cadillacs" than the others, and were "more competent." [JA Vol. II, pp. 410-413]. Ehlers, as of June 1, 1965, had fourteen persons employed in supervisory capacity throughout the service and maintenance departments. Of this number, nine were employed by General Motors prior to June 1, 1965. [JA Vol. II, pp. 447-455, GC-3]. Of the five personnel employed in the parts department under Ehlers, all of them were employed previously by General Motors in the same location and the same department [JA Vol. II, pp. 458-460]. Of the twelve persons employed by Ehlers in the clerical section, eight were previously employed in that section by General Motors at the same location and one additional was employed at the Seventh Street factory branch [JA Vol. II, pp. 460-465]. Of the twelve new car salesmen and four used car salesmen em-

ployed by Ehlers as of June 1, 1965, all of them were on the payroll for General Motors at the Wilshire branch prior to the takeover [JA Vol. II, p. 466]. In total, Ehlers hired a total of eighty-seven employees, including management and supervision, of whom fifty-four had formerly been employed by General Motors at the Wilshire Boulevard branch. Some General Motors Work-in-Process was completed by Ehlers [JA Vol. I, p. 24].

Neither Thomas nor Ehlers ever petitioned the Board for the conduct of an election in order to resolve the question of representation. Neither did they ever indicate a doubt that Petitioners represented the great majority of the employees on the payroll of General Motors, as of May 19, 1965. The Trial Examiner found that May 11 and 12, 1965, the date of execution of the appropriate documents, was the date of succession [JA Vol. I, p. 43]. This finding was not reversed.

Thus, out of sixty-three employees in the service department, Thomas hired sixteen. Out of thirty-five service employees formerly at Wilshire, Ehlers hired eleven.

Proceedings Below.

A consolidated complaint issued November 30, 1965, and the matter was heard before Trial Examiner Lowell Goerlich on February 23, 24, 25 and 28, 1966. The Complaint alleges that

> "since on or about May 19, 1965, and thereafter the IAM has requested . . . that Respondent Ehlers bargain collectively with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment as the exclusive collective bargaining representative of the employees . . ."

A similar allegation was made with respect to Respondent Thomas [JA Vol. I, pp. 349-350]. It is then alleged that the respondents have refused to bargain collectively with respect to rates of pay, . . . and other terms and conditions of employment. . . . [JA Vol. I, p. 352]. Similar allegations are contained with respect to Petitioner Painters [JA Vol. I, pp. 352-353]. The Trial Examiner concluded that there was sufficient similarity in the employment industry at both Wilshire and Bixel before and after the transfer so as to constitute Thomas and Ehlers successors to General Motors Corp. He concluded, therefore, that by refusing to hire the employees at General Motors, or to bargain with Petitioners on this question, and by refusing to recognize said Petitioners in any regard as bargaining agent, Section 8(a)(1) and (5) had been violated. By way of remedy, the Trial Examiner ordered: (1) that the employees formerly on the payroll of General Motors in the bargaining unit be reinstated and made financially whole (2) that Thomas and Ehlers recognize and bargain with petitioners; (3) that Thomas and Ehlers honor and give effect to the existing collective bargaining agreement between the unions and General Motors dated December 1, 1964; (4) that Thomas and Ehlers cease changing unilaterally the working conditions of the employees; and (5) that Thomas and Ehlers cease interfering with, restraining or coercing the employees in the exercise of the rights guaranteed by Section 7 of the Act.

On March 29, 1968, the Respondent National Labor Relations Board, hereinafter called "Board," issued its Order finding that the Trial Examiner's rulings were affirmed but essentially reversing his determination that

successorship existed. The Board concluded that Respondents Thomas and Ehlers did not owe a duty to bargain with either of Petitioners and consequently the complaint was dismissed. *We note that all evidence relating to the request for recognition, the refusal by Ehlers and Thomas to discuss the issue of employee retention, and the subsequent hiring of personnel by standards known only to Thomas and Ehlers was placed before the Trial Examiner.*

The Court of Appeals, in affirming the Board, stated that the operational format and a nondiscriminatory personnel turnover negated a finding of successorship. The opinion stressed the difference in business objective between the independent dealerships on the one hand and the General Motors factory affiliated service establishment on the other.

The concurring opinion dealt considerably with the question of the relationship of the employees of the old enterprise to the owner of the new. It stressed that this relationship was entitled to protection "during the hiatus between the time of sale and actual takeover." The opinion then states that the employees of the Seller are not to be equated with strange applicants, and that a duty exists upon the Purchaser to recognize the bargaining agent on the issue of retention of jobs. Conceding this duty was not fulfilled by Ehlers and Thomas, the concurring opinion then states that because of the General Counsel's failure in his complaint to charge a failure to bargain over the limited issue of continuation of employment for the General Motor's employees, rather than the duty to bargain with the Unions as bargaining agent for all conditions of employment, the issue was not properly before the Court.

REASONS FOR GRANTING THE WRIT.

Employees of a Unionized Business Concern Which, After Sale, Maintains a Continuity of Business Purpose, Are Afforded the Right Under Federal Law to Have the Continuation of Their Employment Determined by the Collective Bargaining Process.

Decisions of this Court and the Circuits have made clear that the interest of a working man in retention of employment is entitled to the highest priority and that the duty to bargain requires a sincere effort through collective bargaining to protect this interest.

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 214.

In *Cooper Thermometer Co. v. NLRB*, 376 F. 2d 684 (CA-2), the Court stated at page 688:

> *"The most important interest of workers is in working;* the Board may reasonably consider that the employer does not fulfill his obligations under Section 8(a)(5) if he refuses even to discuss with the employee representatives on what basis they may continue to be employed." (Emphasis added.)

This issue, in the context of an economic strike, likewise has engendered great concern by this Court. In *NLRB v. Erie Register Corp.*, 373 U.S. 288, 229, 333, employers were held to be required, subject to limited exception, to reinstate economic strikers upon the termination of the strike, and their failure to do so was held to necessarily infringe upon the employees free exercise of "concerted activities for the purpose of collective bargaining."

In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, this Court recognizing the high priority afforded to the right to work stated that:

> "A refusal to reinstate striking employees . . . is clearly no less destructive of important employee rights than a refusal to make vacation payments." (p. 379).

And again:

> "*This basis right to jobs* cannot depend upon job availability as of the moment when the applications are filed. The right to reinstatement does not depend upon technicalities relating to application, and 'the right can be defeated only if the employer can show legitimate and substantial justifications.'" (Emphasis added.) (p. 379).

In *NLRB v. Royal Plating & Polishing Co.*, 350 F. 2d 191 (CA-3), an employer prior to moving his business location was held required under Section 8(a)(5) to notify the Union of his intentions so that the Union would have opportunity "to bargain over the rights of the employees whose employment status will be altered by the managerial decision." (p. 196).

The priority afforded to work opportunities is well recognized by the Board in *Westinghouse Electric Corp.*, 150 NLRB 1574. In that case, the Board, in rationalizing the *Fibreboard* line of cases, states:

> ". . . where the Board has found unilateral contracting out of unit work to be violative of Section 8(a)(5) and (1), it has invariably appeared that the contracting out . . . affected a change in conditions of employment, or resulted in a signif-

icant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit." (p. 1576).

The right to work we submit is one of the "important employee rights" within the protection of Section 7, whether the employee is engaged in an economic strike or whether he simply works for an employee who fortuitously sells the business concern to another. In either case, the refusal to reinstate the striker and the refusal to even discuss with the certified bargaining agent the conditions under which all or some of the seller's work force might be retained are equally "destructive" of such rights.

As the Trial Examiner stated in the instant case:

> "Moreover . . . through the happenstance of succession, employees are exposed to the loss of seniority, accrued employment benefits and job security. Furthermore, employees who have reached an age when their employment is not attractive to employers but whose qualifications for employment otherwise would be suitable, may be cast upon a labor market to flounder about with a strong probability that they will continue unemployed and the dregs of the labor market. Such unhappy results do violence to the humanitarian objectives of the Act and the teachings of the Court to the end that employees may be protected 'from a sudden change in the employment relationship.' Surely such a strained construction of the Act ought not to be indulged unless clearly compelled by the Act. . . ." [App. C, pp. 48-49].

It is recalled that the certified bargaining agents attempted to meet with the employer prior to the actual physical change-over of ownership. Their offer was flatly refused by Ehlers and ignored by Thomas. Subsequently, on May 19, 1965, the employees were terminated by the seller. The majority opinion in the decision below stresses that Thomas and Ehlers selected its new employees "on the basis of skill, ability and experience and were in no way influenced by Union membership of the job applicant." [App. A, p. 4].

We submit this is the vice of the problem. Rather than submitting the important question of retention of employment of the many long time employees to the collective bargaining process, the companies unilaterally looked to the outside and applied its own mystic criteria. The lower Court lauds Ehlers and Thomas for the fact that they did not discriminate. *It is immaterial, we submit, as to what standard the employers applied. They were bound by Federal law to bargain collectively with the Unions at least during the hiatus period with respect to the retention of the work force. The preservation of job opportunities by the union for as large a number of employees as possible was a matter of legitimate interest to the Union and the many long time employees affected.*

Ehlers and Thomas treated the employees of General Motors as new job applicants. We submit the law in its wisdom has gone beyond this point. It recognizes uniformly that employees of a seller have sufficient contact with the new employer so as to be protected by the Act. In *K. B. & J. Young Supermarkets v. NLRB*, 377 F. 2d 463 (CA-9) the Court treated the termination by the predecessor as the termination of the suc-

cessor and held in effect that the successor owed a duty to bargain with respect to retention of employment.

In *Chemrock Corp.*, 151 NLRB 1074, 1078, a decision relied upon heavily by the Trial Examiner but totally ignored by Respondent Board and the majority opinion in the lower Court, the Board held that in this area the purchaser is obligated to bargain with the incumbent Union before it terminates or otherwise changes the employment status of the predecessor's employees. If the purchaser fails to fulfill this obligation to bargain, it will be presumed that had he done so, he would have hired the predecessor's employees and the criterion of substantial continuity of employee compliment will have been satisfied.

The concurring opinion of Justice Leventhal in the decision below recognizes the employer's duty in this area. The opinion states:

> "Employees of the old enterprise may, for some limited purpose, stand in a relationship to the owners of the new enterprise that has some protection during the hiatus between the time of sale and the actual takeover. They are not necessarily to be equated with strange applicants for employment in the new enterprise. . . . In some cases that can be denominated full successorship there may be a complete transfer of the duty to bargain with representatives already chosen by the employees. . . . The continuance of such a duty would depend on a finding of full successorship. This would require some retention of employees and a continuity of business purpose between the old and new enterprise. . . . Where there is a continuity of business purposes, there may be a preliminary

> and partial bargaining relationship during the transition period even though, for all the parties can know, there will ultimately be such a change made in good faith, that there will not be full successorship and that the previous choice of representative by the employees will no longer be valid. . . . The subject of such preliminary bargaining may include matters such as preferences for certain employees should the purchasing enterprise choose to retain workers with the skills possessed by the seller's employees. *This is a matter of particular concern to the employees and the Union.* . . ." [App. A, pp. 10-12]. (Emphasis added)

Obviously, Thomas and Ehlers owed a duty to meet with the certified bargaining agent pursuant to its request prior to the actual takeover, and termination of employees.

The concurring opinion dismisses this point then for the reason that the General Counsel's complaint

> "did not charge a failure to bargain over the limited issue of continuation of employment to the General Motors employees. Rather it charged broadside that the new employees failed to recognize and bargain with the Unions as representatives of a newly constituted employee units of the new enterprises. . . ." [App. A, p. 13].

Here we must respectfully disagree with the reasoning of the concurring opinion. The Complaint [JA-339] alleges that since May 19, 1965, the Machinist Union requested Ehlers to bargain collectively "with respect to . . . other terms *and conditions of employment* . . .", and since May 17, 1965, as to Thomas. Likewise, is the

case with respect to the Painters Union [JA 349-350]. At the hearing, this issue was fully litigated before the Trial Examiner [JA Vol. II, p. 642, GC 7(a), p. 644, GC 7(b), p. 45, GC 7(c), pp. 647-648, GC 7(e) p. 648, GC 7(f), pp. 720-721, GC 12(A), p. 722, GC 12(B), GC 12(C) and GC 12(D)]. Well established case law makes clear that so long as a matter is litigated at the hearing and a party is not surprised, the fact that a Board order is at variance with a complaint is not a ground for declaring it invalid. *NLRB v. Fant Milling Co.*, 360 U.S. 301 ("The Board was created not to adjudicate private controversies but to advance public interest in eliminating obstructions to interstate commerce. *National Licorice Co. v. NLRB*, 309 U.S. 350; *NLRB v. Kiekhaefer*, 292 F. 2d 130 (CA 7).

The Decision below recites that "even a cursory comparison of the differences in the enterprise as operated by General Motors and those operated by Thomas and Ehlers shows a marked lack of identity." It then proceeds to stress the fact that Thomas and Ehlers were in direct competition for sales and service while under General Motors ownership, supposedly there was not aggressive advertising in sales promotion vis-a-vis other General Motors dealers; that management, accounting and advertising while formerly under control were totally separate and independent after the new franchise dealers took over. The Board and lower Court in effect stressed the form of the business enterprise. However, the Board itself has stated recently in *Texas Eastman Company*, 175 NLRB No. 105 (April 28, 1969):

> ". . . It is not the form of the transfer which controls but, as stated above, whether the employing industry remained essentially the same."

In the instant case the primary purpose of the enterprises prior to and following the transfer were the sale and service of new and used Cadillac automobiles. Admittedly, the functional activities of the employees in the bargaining unit were substantially the same. It was clearly developed that General Motors, while executing franchise agreements, by the terms thereof, strictly controlled the method and manner of selling and servicing its automobiles. Rather than distribute its own product, it chose to accomplish the same through the conduit of dealers. However, the franchise agreement makes clear the strict control that General Motors retained over its product. We do not argue this issue at greath length since it is recognized that the Board has made findings on this subject. *However, there is at least the "continuity of business purpose" sufficient to establish a "preliminary and partial bargaining relationship during the transition period . . ." in accordance with the concurring opinion below to impose upon the employer the limited duty of responding affirmatively to the Union's request to subject the important issues of retention of employment to the collective bargaining process.* It is unnecessary to determine the extent of the duty imposed upon the employers. The fact is that in the instant case, they chose to reject all efforts by the Unions to bargain in an effort to preserve some of the jobs of the long time employees, to unilaterally hire their employees from the outside by their own established criteria, and to ignore completely the fact that Petitioners had been the certified bargaining agents for over eight years.

The decision of Ehlers and Thomas with regard to selection of a work force was, as stated in *Fibreboard*:

"Suitable for resolution within the collective bargaining framework . . ." (379 U.S. at 214). See also *Order of Railroad Telegraphers v. Chicago & N. W. Ry.*, 362 U.S. 330.

Conclusion.

From the above, it is clear that not only is an important question of Federal law presented in this petition for review, but that the Court below has decided a Federal question of substance erroneously and in conflict with applicable decisions of this Court and of the Second, Third and Ninth Circuits.

In effect, the lower Court has recognized that the legally protected interest of an economic striker in retaining his job is non-existent in the case of a working man who after years with a company is terminated when the purchaser elects to hire his new work force from outside sources.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

HERBERT M. ANSELL,
ABE LEVY,
PLATO E. PAPPS,
Attorneys for Petitioners.

APPENDIX "A".

On Petition to Review an Order of the National Labor Relations Board.

United States Court of Appeals for the District of Columbia Circuit.

No. 21,972

International Association of Machinists, District Lodge 94, AFL-CIO, et al., Petitioners v. National Labor Relations Board, Respondent, Lou Ehlers Cadillac & Thomas Cadillac, Inc., Intervenors.

Decided May 2, 1969

Mr. Herbert M. Ansell, of the bar of the Supreme Court of California, *pro hac vice,* by special leave of court, with whom *Mr. Plato E. Papps* was on the brief, for petitioners.

Mr. Richard N. Chapman, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, and *Marcel Mallet-Prevost,* Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Mr. Richard W. Lund, with whom *Mr. Joseph A. Wheelock, Jr.* was on the brief, for intervenor, Lou Ehlers Cadillac.

Mr. H. Burdette Fredricks, with whom *Messrs. Henry W. Low* and *Edward A. McDermott* were on the brief, for intervenor, Thomas Cadillac, Inc.

Before: Burger, Tamm and Leventhal, *Circuit Judges.*

Burger, *Circuit Judge:* Petitioners seek review of an order of the National Labor Relations Board dismissing a complaint alleging that Thomas Cadillac and Lou Ehlers Cadillac violated Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5), by failing to recognize and bargain with the petitioning Unions.

Prior to the time Thomas and Ehlers began operations, two factory-dealerships in Los Angeles were owned and operated directly by Cadillac Division of General Motors Corporation. During the period these two factory dealerships were operated by Cadillac Division, the Machinists Union was certified as the bargaining agent for a single unit covering the operations of both outlets along with a third branch which was a used car outlet disposing of cars taken in trade by the two retail branches. The Painters Union was certified later during this period as bargaining agent for a single unit of auto body painters for both Cadillac outlets. The two Unions bargained jointly with General Motors and a single contract was made for both retail outlets. The contract provided the same wages, grievance procedures and other benefits for all employees wherever assigned, and a common seniority list covered both branches. A unique feature of the single contract provided transferability of seniority, vacation and holiday pay at all General Motors plants wherever located. All employees were covered by General Motors' pension and insurance programs. This contract was in effect when General Motors sold its outlets to the two independent franchise dealers.

While General Motors operated the Cadillac outlets in Los Angeles they were managed and administered as a single unit with a central accounting system, central personnel, credit and purchasing controls. When General Motors decided to terminate direct retail operations in Los Angeles it so advised the two Unions and subsequently reached agreement with them on the rights of the General Motors' employees.[1] Thereafter, the sale of assets and franchise agreements were separately made with the two new dealers who had no business relationship with each other.

At the time General Motors terminated its operations it employed 117 employees in service departments, 75 at what was to become the Thomas outlet and 42 at the Ehlers outlet. All were union members except three mechanics and one painter. Prior to the actual transfer of assets, the unions requested that the new dealers meet with them to "clarify the rights of the employees." Ehlers responded that this was premature and Thomas made no reply.

The new Cadillac dealers immediately began operations under separate competing franchise contracts. Thomas

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[1]In his concurring opinion, Member Jenkins stated:

> Meetings [between General Motors and] the Union resulted in a Supplement Agreement, dated April 28, 1965, which provided that, in anticipation of General Motors' closing Bixel and Wilshire, employees who left to take another job could voluntarily be laid off out of line of seniority. In addition, General Motors agreed to give employees vacation and absence pay prorated to the date of termination, lump sum payment of amounts accumulated under the General Motors Income Security Plan, retirement benefits for employees having reached the permissible retirement age of 60 and having the minimum 10 years of service, and pensions to those between the ages of 55-60 who otherwise qualified for retirement. A sizable [sic] number of employees took advantage of these provisions. (Joint Appendix 60-61).

hired a total of 63 service employees, 16 of them former General Motors employees who were union members; Thomas also hired a new supervisory staff of 7 persons only 3 of whom had worked for the former General Motors outlets. One assistant sales manager and an accounting supervisor who had woked for unrelated General Motors outlets were also hired.

Ehlers hired 11 service employees and several salesmen who had worked in the predecessor General Motors operation, Ehlers brought in former employees of his own in most supervisory posts. The Board found on undisputed evidence that both dealers hired their new staffs solely on the basis of competence and were not influenced by the union membership of job applicants. The Board also found that neither dealer had any connection with General Motors except by virtue of the franchise as a dealer.

In the face of the refusals by Thomas and Ehlers to negotiate the claims of the Unions, picketing of both dealers was commenced. The Unions made no claim to represent a majority of the employees of Thomas and Ehlers. Nevertheless, the Examiner concluded that Thomas and Ehlers were successor employers and hence required to recognize the Unions and bargain with them. The Board found this determination to be erroneous and held that Thomas and Ehlers did not take over or succeed to the General Motors bargaining unit. In concluding that the new franchise dealers did not take over or succeed to General Motors' bargaining unit the Board relied on the changes in structure, organization management, and employees, and the alterations in the relationship of the two retail outlets to each other, to General Motors, and to the public.

The record amply supports the Board's determination that Thomas and Ehlers selected new employees on the basis of skill, ability and experience "and were in no way influenced by union membership of the job applicant." Even a cursory comparison of the differences in the enterprises operated by General Motors and those operated by Thomas and Ehlers shows a marked lack of identity. The outlets operated by Thomas and Ehlers were in direct competition for sales and service not only with each other but all other dealers, General Motors and unrelated, whereas under General Motors ownership there was not aggressive advertising and sales promotion vis-a-vis other General Motors dealers. Thomas and Ehlers compete with each other for sales to customers while the General Motors managed enterprise was relatively indifferent in the sense that General Motors did not have the same interest in competing with franchise Cadillac dealers as do Thomas and Ehlers. As noted, management, accounting, and advertising were centrally controlled under the factory management but are totally separate and independent after the new franchise dealers took over.

Once Thomas and Ehlers took over, no common seniority was feasible and no transfers from one establishment to the other—or to an unrelated General Motors operation—were available. Thomas and Ehlers each established a new management and supervisory hierarchy. Each was free to fix wages and working conditions subject only to the normal competition for skilled service personnel in the local labor market. From a management point of view, given the fiercely competitive nature of retail auto sales, each enterprise was now "on its own"; attitudes on sales and perform-

ance which might have been tolerable to General Motors would not be acceptable to independent dealers.

A comparison of these factual aspects indicates at once that this record is clearly distinguishable from successorship cases cited by the petitioners. *See, e.g., K. B. & J. Young's Supermarkets, Inc. v. NLRB,* 377 F. 2d 463, 466, 65 LRRM 2369 (9th Circ. 1967). These comprehensive changes, and others we deem it unnecessary to detail, furnish support for the Board's determination that no successorship existed. To have concluded otherwise would have deprived the new employees of Thomas and Ehlers—a majority of whom had no prior affiliation with Petitioners—of rights guaranteed them by Section 7 of the Act to be represented by an agent of their own choice.

It should be noted that the Board's finding of nonsuccessorship did not turn on the fact that a majority of the new employees were not members of the old bargaining unit; if the composition of the unit was the controlling factor in determining successorship, a purchaser might well seek to avoid application of the successorship principle by refusing to hire the seller's employees.[2] Of course, if the purchaser deliberately sets out to destroy a union when he takes over a going business other consequences of a violation of the Act might well arise. As previously noted, however, there is undisputed evidence on the record that Thomas and Ehler's selection of new employees to staff the significantly altered operations was based only on skill and ability, and that union affiliation played no part.

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[2] *See* Note, *Obligations of Successor Employers: Recent variations on the John Wiley Theme,* 2 Ga. L. Rev. 574, 582-86 (1968).

Our review satisfies us that the record contains substantial evidence which supports the Board's finding that Thomas and Ehlers were not successors of the General Motors' dealerships, thereby neutralizing the contention that the prior existence of a valid certification created a presumption of continued majority status which obligated Thomas and Ehlers to bargain with the Unions. The substantial non-discriminatory change in personnel found by the Board, along with the changes in operational structure, negated any such presumption. *See NLRB v. John Stepp's Friendly Ford, Inc.*, 338 F. 2d 833 (9th Cir. 1964); *cf. International Union, United A., A., Temp. Wkrs. v. NLRB*, 129 U.S. App. D.C. 282, 394 F. 2d 757, *cert. denied*, 393 U.S. 831 (1968).

On substantial supporting evidence the Board found that the changes in operational format and nondiscriminatory personnel turnover negated a finding of successorship. Those findings effectively overcome the presumption of continuing majority status thereby placing on the Union the burden of making this showing. Petitioners have not claimed, nor are they able to demonstrate, this circumstance.

The petition for review is

Denied.

Leventhal, *Circuit Judge*, concurring: I concur in the majority opinion's finding of substantial evidence in the record to sustain the Board's determination in this case that these intervenors did not inherit a duty from General Motors to recognize the union as representatives of their employees after the assumption of operations at these two separate locations. As the ma-

jority opinion forcefully points out, there is a significant difference in business objective between the independent Thomas and Ehlers dealerships, on the one hand, and the General Motors factory-affiliated service establishment, on the other, and this is a telling factor.[1]

I add a separate statement to obviate the possibility that some languge in the majority opinion be extended so as to choke the Board in its evolution of sound successorship doctrine. It is with some diffidence that I speak further to this point at this time, but I am comforted as I approach the task by the reflection that if what I have to say merits amendment, it may at least help others in the delineation of their thoughts. This subject of successorship is shrouded in somewhat impressionist approaches, if I may judge from oral argument. Analysis that is clear and realistic is welcome in all areas of law, of course, but is particularly valuable in regard to "successorship" doctrine. For this is a multi-faceted concept that, properly applied, may permit and even facilitate orderly transfers of capital and assets that take due account of appropriate interests of employees and thus by providing transitions with a minimum of disruption may advance the cause of industrial peace.

1. The purchaser of a business does not take title unencumbered by the labor relations obligations of his predecessor. He is well advised to analyse labor title as much as real title. Rooted in our competitive enterprise system is a strong policy in favor of free transfer

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[1]An interesting comparison is found in NLRB v. Alamo White Truck Service, Inc., 273 F.2d 238, 241 (5th Cir. 1959).

of assets and flexibility of new management attuned to economic efficiency. This is not, however, an absolute value. It must be balanced against the policies of protection for labor and stability of labor relations that are embodied in the federal labor statutes.[2] Under the policies of these laws the new owner does not start with a completely blank slate. There is law as well as economic appraisal underlying the reality that the value of a going business is affected by existing personnel arrangements and practices, whether there is enhancement or diminution in good will value.[3]

2. I am particularly concerned lest some of the language in the majority opinion may be taken to indicate that the acid test of "successorship" is whether the work force of the old enterprise is carried over to the

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[2]*See generally,* Barbash, Status of the Collective Bargaining Agreement Under Wiley v. Livingston: A Management Counsel's View, New York University, Eighteenth Annual Conference on Labor 259 (1966); Feller, Status of the Collective Bargaining Agreement Under Wiley v. Livingston: A Union Counsel's View, New York University, Eighteenth Annual Conference on Labor 277 (1966); Note, The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley & Sons, Inc. v. Livingston, 82 Harv. L. Rev. 418 (1968); Note, Obligations of Successor Employers: Recent Variations on the John Wiley Theme, 2 Ga. L. Rev. 574 (1968); Comment, Successor Employer's Obligation to Remedy Unfair Labor Practices, 68 Colum. L. Rev. 1602 (1968).

[3]Thus a purchase of a business may be called upon to remedy unfair labor practices of the prior owner. *See, e.g.,* U.S. Pipe & Foundry Co. v. NLRB, 398 F.2d 544 (5th Cir. 1968). The court took pains to recognize U.S. Pipe's status of "good faith purchaser" but held, nevertheless, that its freedom of action was limited by the policy of the Labor Acts. As the court pointed out, the balance between freedom for the purchaser and fairness to the employees must be struck in equitable terms: whether the requirement of bargaining (or reinstatement as was the issue in *U.S. Pipe*) is necessary to protect employees and whether there is an undue encroachment on the successor's freedom. 398 F.2d at 547-48.

new company. While that fact may be significant for certain situations, it ignores the substantial interest of employees in "protection . . . from a sudden change in the employment relationship." *See John Wiley & Sons v. Livingston,* 376 U.S. 543, 549 (1964).[4] Employees of the old enterprise may, for some limited purpose, stand in a relationship to the owners of the new enterprise that has some protection during the hiatus between the time of sale and actual take-over. They are not necessarily to be equated with strange applicants fore employment in the new enterprise.[5] It is not needful, perhaps not even appropriate, for me to delineate

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[4]The search for continuity in the retention of employees may be appropriate where the issue is successorship for the purpose of establishing a duty to arbitrate under a contract, *compare* United Steelworkers v. Reliance Universal Inc., 335 F.2d 891 (3d Cir. 1964) *with* Retail Employees Local 954 v. Lanes of Findlay, Inc., 260 F. Supp. 655 (N.D. Ohio 1966). It may also be controlling on the question of whether a duty to bargain with the union exists after the take-over. See *infra.*

[5]*See* Chemrock Corp., 151 N.L.R.B. 1074, 1078 (1965), where the Board said: ". . . where . . . the only substantial change wrought by the sale of a business enterprise is the transfer of ownership, the individuals employed by the seller of the enterprise must be regarded as 'employees' of the purchaser as that term is used in the Act. Such individuals possess a substantial interest in the continuation of their existing employee status, and by virtue of this interest bear a much closer economic relationship to the employing enterprise than . . . the mere applicant for employment. . . ." *See also* Martin Marietta Corp., 159 N.L.R.B. 905 (1966); *cf.* International Longshoremen's Ass'n, 158 N.L.R.B. 1687, 1697 (1966) (Member Fanning, dissenting). *Compare* the Supreme Court's approach in John Wiley & Sons v. Livingston, 376 U.S. 543, 549, which involved the question of whether the arbitration provision of a labor contract had to be honored by a succeeding employer: "Employees and the union which represents them ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as em-

the nature of the relationship nexus between the old employees and incoming management. That will depend on the shape of the facts. In some cases that can be denominated full successorship there may be a complete transfer of the duty to bargain with representatives already chosen by the employees.[6] The continuance of such a duty would depend on a finding of full successorship. This would require some retention of employees and a continuity of business purpose between the old and new enterprise. Obviously the mere transfer of assets, even on a wholesale basis, does not amount to continuity if the equipment is being put to a different industrial use.[7] Apparently less significance would be due a change in location.[8]

Where there is a continuity of business purpose there may be a preliminary and partial bargaining relation-

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ployers be balanced by some protection to the employees from a sudden change in the employment relationship." For the view that *Chemrock* is a germinal decision that "presages the birth of new doctrines in order to accommodate the *Wiley* decision with Board law," see Sangerman, The Labor Obligations of a Successsor to a Unionized Business, 19 Lab. L.J. 160, 177-78 (1968).

[6]*See e.g.*, Overnite Transp. Co. v. NLRB, 372 F.2d 765 (4th Cir. 1967). The obligations of subsequent management depend on the extent of identity and continuity between the old and new enterprise and the timing of labor's demands. Arbitration, bargaining, remedying unfair labor practices of the seller, and engaging in preliminary discussion impose different burdens on new management and the degree of continuity required to trigger these obligations varies. *Compare* Note, The Successor Employer's Duty to Arbitrate: A Reconsideration of John Wiley v. Livingston, *supra*, note 2, at 429.

[7]*Compare* Northwest Galvanizing Co., 168 N.L.R.B No. 6 (1967).

[8]If the business is carried on in the same location, this is persuasive evidence of some continuity. *Compare* Piano & Musical Instrument Workers Union v. W. W. Kimball Co., 379 U.S. 357 (1964), *reversing per curiam* 333 F.2d 761 (7th Cir. 1964). The Seventh Circuit had relied on the shift in locale as a factor

(This footnote is continued on the next page)

ship during the transition period even though, for all the parties can know, there will ultimately be such a change, made in good faith, that there will not be a "full successorship" and that the previous choice of representative by the employees will no longer be valid.

The subject of such preliminary bargaining may include matters such as preferences for certain employees should the purchasing enterprise choose to retain workers with the skills possessed by the seller's employees. This is a matter of particular concern to the employees and the union. *See* Martin Marietta Corp., *supra* note 5; *Compare International Longshoremen's Ass'n,* Member Fanning's dissenting opinion, *supra* note 5.[9] While the union might properly insist on the right to participate in a responsible and prompt fashion in negotiations preliminary to the opening under new management, the union, of course, would not be entitled to drag out the preliminary bargaining process.

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negating a finding of successorship. *Compare also* Northwest Galvanizing Co., *supra* note 7, where the Board noted:

> "We deem it highly significant that Respondent here did not purchase a business, but purchased for addition to its already existing business the equipment utilized as a small part of the overall . . . operation. This is not a case in which the buyer assumes control of the seller's business and later decides to move elsewhere. The equipment purchase was part of a long term expansion program of Respondent which temporarily utilized the premises of the seller of that equipment until its own facilities were sufficiently expanded to permit consolidation thereof with its own identical operations."

[9] *Compare* K. B. & J. Young's Super Markets, Inc. v. NLRB, 377 F.2d 463, 466 (9th Cir.), *cert. denied*, 389 U.S. 841 (1967), where the court said "John Wiley & Sons v. Livingston, . . . establishes that where there is substantial continuity of identity in the employing enterprise a change in ownership does not, by operation of law, automatically terminate all rights of the old employees and that such rights remain the leigitimate subject of dispute. Importantly included in such potentially bargainable issues, in our view, is continuity of employment. . . ."

3. There is always, obviously, tension between the principle of entrepreneurial freedom and economic efficiency, on the one hand, and stability of labor relations on the other. In the context of the pre-takeover situation the balance is particularly delicate. The existence and extent of duty to bargain will depend on the circumstances and issues involved, and its delineation is properly a matter for the Board in the first instance. The manifest difficulties call to mind what the Supreme Court said in *Fibreboard Paper Pds. Corp. v. NLRB*, 379 U.S. 203:

> . . . although it is not possible to say whether a satisfactory solution could be reached, national labor policy founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiations. (p. 214)

4. In this particular case the General Counsel's complaint did not charge a failure to bargain over the limited issue of continuation of employment for the General Motors' employees. Rather it charged broadside that the new employers failed to recognize and bargain with the unions, as representatives of the newly constituted employee units of the new enterprises, with respect to hours, wages, and other terms of employment.

This is an entirely different matter from bargaining with a union over issues involved in constituting the new work force. Before the new enterprise selects its employees, it can, of course, bargain with the representatives of the old employee group without any conflict with principles of self-determination. However, an order from the Board directing Ehlers and Thomas to bargain with the union as the representative of their

current employees might very well have undercut the principle of employee free choice that lies at the very heart of the Labor Acts. The cases involving the presumption of full continued majority status for a certified union are primarily instances where the purchasing enterprise has retained all or most of the old employees.[10]

On balance I think the Board was within its discretion in rejecting the Union's contention and concluding that here the new enterprises lacked the substantial identity and continuity of business purpose that required continued recognition of the union as employee representative after the new concerns and new rosters took over operations. The changes in method of operation, including significantly the change from the sheltered manufacturer-connected facility to the independent distributor orientation, and the substantial dissimilarities in personnel rosters, arrived at without discrimination against the old employees, support the Board's conclusion.[11]

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[10] *Compare* Overnite Transp. Co. v. NLRB, *supra* note 6, where the court upheld a Board finding that the purchasing company violated the Labor Acts by making unilateral changes in terms of employment after assuming managerial responsibility. The duty to bargain with the union attached immediately after take-over since there were "no significant changes . . . in operation" and the company had offered employment to all of the employees in the former unit. 372 F.2d at 768. In the case before us the old employees constituted a minority of the new work force. *Compare* also NLRB v. John Stepp's Friendly Ford, Inc., 338 F. 2d 833 (9th Cir. 1964) (no duty to bargain after take-over where there is "substantial change in the identity of work force."); NLRB v. Alamo White Truck Service, Inc., *supra* note 1.

[11] This would not be the case where the purchaser refused to hire the old employees simply for the purpose of avoiding recognition of the union. *See, e.g.*, K. B. & J. Young's Super Markets, Inc. v. NLRB, *supra* note 9.

APPENDIX "B".

Decision and Order.

On May 17, 1966, Trial Examiner Lowell Goerlich issued his Decision in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondents filed exceptions and supporting briefs; the Charging Parties filed a brief in support of the Trial Examiner's Decision; and the General Counsel filed a Memorandum in support of the Trial Examiner's Decision and a statement of position.[1]

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts only those findings, conclusions, and recommendations of the Trial Examiner consistent with this Decision and Order.

The Trial Examiner found that Thomas Cadillac, Inc., herein referred to as Thomas, and Lou Ehlers Cadillac, herein referred to as Ehlers, were successors to the Cadillac Motor Car Division, General Motors Corporation, Los Angeles Branch, herein referred to as GM, and thus were required to recognize and to bargain

[1]In view of our disposition herein, we find it unnecessary to pass upon the Respondents' requests for oral argument, or Respondent Ehler's Motion for the Board to take judicial notice of a related Section 301 court proceeding and the Unions' Answer thereto.

jointly with the Automotive, Marine, Production Finishers, Equipment Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paper Hangers of America, AFL-CIO, herein referred to as the Painters, and the International Association of Machinists, District Lodge 94, AFL-CIO, herein referred to as the Machinists. He based his finding of successorship upon the factual determination that the "employing industry" as it existed before the acquisition by Thomas and Ehlers of GM's Los Angeles sales locations remained the same; namely, the sale of Cadillac motor vehicles, parts and accessories, and the service of such vehicles by former GM employees. He did not find controlling the facts that the transfers of operations were bona fide business transactions carried out at "arm's length," or that only a minority of GM's service unit employees were hired by Thomas and Ehlers. Nor did he place any significant weight on the special factual situation that Thomas' and Ehlers' predecessor was GM, a large corporate enterprise, or that two separate and competing franchise dealers took over locations of a prior multi-branch unit.

The Respondents contend, in pertinent part, that they are not successors to GM, and are in effect new and independent business entities, markedly different from the former GM operation. Ehlers and Thomas contend that they have no obligations to deal with the Unions, or to assume the Unions' contract with GM, and in no way led GM, the Unions, or the employees to believe that they had such obligations. All employees, they argue, including former GM employees, were hired on the basis of merit without regard to prior union membership, and they assert that the contract unit no longer

exists. For the reasons discussed below, we find merit in the Respondents' contentions that they are not under any obligation to bargain with the Unions herein involved.

The record shows that, in 1949, GM opened a branch retail sales outlet for the sale of Cadillac motor vehicles, parts, and accessories and the servicing of such vehicles at West Seventh Street (Bixel), and, in 1954, opened a similar branch at Wilshire Boulevard (Wilshire), in Los Angeles, California. In addition, GM also operated, as part of its sales operation in the Los Angeles area, a used car lot at South Vermont. Pursuant to a consent-election agreement, the Machinists was certified on August 1, 1957, for a single unit consisting essentially of all shop employees, including painters, at both the Bixel and Wilshire locations. A collective-bargaining agreement was executed between GM and the Machinists on October 17, 1957, to expire in October 1958, covering the employees at both locations.

On November 6, 1958, the Painters was certified after a Board-conducted election, for a single unit of auto body "painters" at both the Bixel and Wilshire locations. Thereafter, the Machinists and Painters bargained jointly with GM for a single collective-bargaining agreement covering the units represented by both Unions. The current contract was executed on December 1, 1964, and was to remain "in full force and effect without change until December 1, 1967." The Agreement covering the two locations provided for common wages, fringe benefits, and grievance procedures. Common seniority lists were maintained by occupation, and there was no loss of seniority in transfers between occupations under the conditions set forth in the contract. In

other ways the contract provisions treated the two branches as a single multiplant unit.

GM decided to cease the retail sale of Cadillac automobiles in Los Angeles in January 1965, and determined to transfer its operations to independent franchise dealers. On May 10, 1965, GM advised the Unions by letter that on June 1, 1965, Thomas would take over the Bixel location and Ehlers would take over the Wilshire location. The following week, the Unions separately requested Ehlers and Thomas to meet with them "to clarify the rights of the employees" of GM. The Unions were informed that the question of recognition was premature. On May 28, 1965, all employees in the bargaining unit were terminated by GM.

Prior to May 28, 1965, GM employed approximately 117 employees in the contract unit, referred to as "service departments." At Bixel there were 75 such employees, and all mechanics except 2, and all painters, except 1, were members of their respective unions; at Wilshire there were 42 such employees in the unit, and only 1 mechanic was not a union member.

Thomas and Ehlers commenced operations as franchised Cadillac dealers on June 1, 1965, as competing enterprises. Former GM service employees were required, the same as other applicants, to submit applications for employment before being interviewed. Of the 63 service department employees hired by Thomas, only 16 were former GM employees, including 1 painter. Out of a supervisory staff of 7, only 3 had been service supervisors for GM. A used car salesman for GM became an assistant used car manager. GM's Los Angeles supervisor of accounting became Thomas' business manager. Of the 35 service department employees employed

by Ehlers, only 11 were former GM unit employees; those were hired on the recommendations of GM's Wilshire service manager and foreman. Ehlers' managers consisted of Lou Ehlers as manager, two employees who had worked with Ehlers at his prior dealership as business manager and general sales manager, respectively, and a former GM Wilshire employee as new car sales manager. In the service department, the service manager and the foreman were not the same individuals who had previously held such positions when GM operated Wilshire. Respondents' contention that employees were hired on the basis of ability is uncontroverted.

In view of the foregoing facts, we find that Thomas and Ehlers did not take over or succeed to GM's bargaining unit. As indicated above, neither employed a significant number of service employees who had worked for GM, and the supervisory hierarchy bears little resemblance to that formerly existing under GM. Moreover, it is clear that both Thomas and Ehlers selected their employees herein involved on the basis of skill and ability, and were in no way influenced by union membership of the job applicant. Accordingly, in the circumstances, the Respondents had no obligation to bargain with the Unions with respect to terms and conditions of employment of employees formerly employed by GM, or with respect to those employees whom they hired after taking over the separate dealer franchises.[2]

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[2]Cf. Overnite Transportation Co. v. N.L.R.B., 372 F. 2d 765 (C.A. 4).

We therefore find that the Respondents have not violated Section 8(a)(1) and (5) of the Act,[3] and we shall order the complaint be dismissed on its entirety.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D. C. Mar. 29, 1968.

FRANK W. McCULLOCH, Chairman
JOHN H. FANNING, Member
SAM ZAGORIA, Member
NATIONAL LABOR RELATIONS
Board

(SEAL)

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[3]Member Fanning also agrees with the concurring opinion of Member Jenkins.

[4]In view of our conclusions above, we deem it unnecessary to pass upon certain other findings and recommendations of the Trial Examiner to which the parties have taken exceptions.

Member Jenkins, concurring:

I aree with my colleagues that the complaint in this case should be dismissed. I also agree with their conclusion that neither Thomas nor Ehlers is a successor employer to the original General Motors retail enterprise at the Bixel and Wilshire locations in Los Angeles, California. However, in reaching this conclusion, in addition to those facts relied on by my colleagues, I also rely on the totality of the evidence present in the record including evidence relating to those events and actions of the parties both before and after Thomas and Ehlers commenced operations as competing franchised Cadillac dealers on July 1, 1965.

I find it significant that the transfer of operations were bona fide business transactions carried out at "arm's length" and that prior to the transfer GM not only notified the Machinists and Painters concerning the contemplated change, but met, discussed, and bargained with the Unions regarding the change. Thus, early in 1965, GM wrote the Machinists and Painters concerning the contemplated change to arrange meetings to discuss the results of the transaction. Meetings with the Unions resulted in a "Supplement Agreement," dated April 28, 1965, which provided that, in anticipation of GM's closing Bixel and Wilshire, employees who left to take another job could voluntarily be laid off out of line of seniority. In addition, GM agreed to give employees vacation and absence pay prorated to the date of termination, lump sum payment of amounts accumulated under the GM Income Security Plan, retirement benefits for employees having reached the permissible retirement age of 60 and having the minimum 10 years of service, and pensions to those between the

ages of 55-60 who otherwise qualified for retirement. A sizable number of employees took advantage of these provisions.

I also find significant that the day-to-day operational practices of Thomas and Ehlers differ not only from each other but from GM. Unlike GM, neither uses a janitorial nor guard service, but hired their own employees for this work. GM had four car attendants in the unit that picked up and delivered customers' cars. This service was discontinued. GM did all its own body work, while both Thomas and Ehlers contract out some body work. GM maintained a used car lot and disposed of most car trade-ins itself. The operations of this lot was discontinued on May 28, 1965, by GM, and Thomas and Ehlers now dispose of most car trade-ins through wholesalers. The Respondents also use sources of financing in the sale of new cars different from GM's sources.

Furthermore, while it is true that the Respondents sell and service the same products as GM, their overall operations bear little resemblance to that of their predecessor. I do not think this factor can be ignored. GM's Los Angeles sales outlets, unlike those of Respondents, were intimately tied in with its entire nationwide manufacturing and sales operations. Thus, the controller, the purchasing agent, the personnel manager, the supervisor of accounting, used car manager, and credit manager while located at the Bixel location were carried on GM's Detroit payroll, and were subject to Detroit's overall direction and supervision. Indeed, GM's agreement with the Unions was patterned after its nationwide contract with another union. Also, under the contract covering GM's operation herein in-

volved, an employee continued to accrue seniority thereunder while employed in any GM plant on national defense work. The holiday, vacation, and paid absence eligibility computations were based upon employment in any GM plant. The contract also included GM's national Pension Plan, Insurance Program, and Income Security plan. Bixel and Ehlers, of course, operate as independent and competing entities.

Thus, while I agree with my colleagues that Thomas and Ehlers did not succeed to the business operated by GM, and that the operations at Bixel and Wilshire are not the same "employing industry" as that engaged in by GM, I do so on the totality of the evidence and not upon the more narrow factual grounds set forth in their opinion.

Dated, Washington, D. C.

Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS
BOARD

APPENDIX "C".

Trial Examiner's Decision.

Upon charges filed by the Automotive, Marine, Production Finishers, Equipment Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paperhangers of America. AFL-CIO, herein referred to as the Painters, and the International Association of Machinists, District Lodge 94, AFL-CIO, herein referred to as the Machinists, the Regional Director for the National Labor Relations Board's Thirty-first Region caused to be issued an order of hearing dated November 30, 1965, in which Thomas Cadillac, Inc., herein referred to as the Respondent Thomas, and Lou Ehlers Cadillac, herein referred to as the Respondent Ehlers, were named Respondents. The complaint charged that the Respondents were each violating Sections 8(a)(1) and (5) of the National Labor Relations Act, herein referred to as the Act.

The Respondents in separate answers generally denied that they had engaged in any of the unfair labor practices alleged in the consolidated complaint.

Pursuant to due notice this case came on to be heard before the undersigned Trial Examiner, Lowell Goerlich on February 23, 24, 25 and 28, 1966, at Los Angeles, California. All parties participated fully in the hearing and each party was offered an opportunity to be heard to call, examine, and cross-examine witnesses, to argue orally upon the record, to submit proposed findings of fact and conclusions of law and to file briefs. All briefs have been reviewed and considered by the Trial Examiner.

The principle issues raised by the parties were:

1. Whether the Respondents Thomas and Ehlers, as successors, refused to bargain collectively with the Machinists and the Painters in violation of Section 8(a)(5) of the Act.

2. Whether the Respondents Thomas and Ehlers violated Section 8(a)(5) of the Act in that each Respondent refused to honor the collective bargaining agreement executed between their predecessor and the Machinists and the Painters.

Upon the whole record and from his observation of the witnesses, the Trial Examiner makes the following:

Findings of Fact

I. The business of the Respondents

Cadillac Motor Car Division, General Motors Corporation, (a Delaware Corporation) Los Angeles branch, herein called General Motors, prior to May 29, 1965, operated two retail Cadillac sales and service agencies, to wit, one located at 5151 Wilshire Boulevard, and one located at 1076 West Seventh Street, both in Los Angeles, California. At each of these locations, in the course and conduct of its business operations, General Motors annually did a gross volume of business in excess of $500,000. At each of these locations, General Motors annually received goods valued in excess of $50,000 directly from suppliers located outside the State of California.

Respondent Ehlers is a California corporation incorporated on May 19, 1965. After June 1, 1965, its offices and principal place of business has been located at 5151 Wilshire Boulevard, Los Angeles, California

and since June 1, 1965, Respondent Ehlers has operated as an authorized dealer for the retail sales and services of Cadillac motor vehicles at such location. Respondent Ehlers is, and has been since June 1, 1965, the successor to General Motors at General Motors' location at 5151 Wilshire Boulevard, Los Angeles, California.

Respondent Ehlers, in the course and conduct of its business operations, in the 12-month period ending June 1, 1966, will do a gross volume of business in excess of $500,000 and will, during the same period, purchase and receive goods valued in excess of $50,000 directly from suppliers located outside the State of California. Respondent Ehlers is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Respondent Thomas is a California corporation. After June 1, 1965, its offices and principal place of business has been located at 1076 West Seventh Street, Los Angeles, California, and since June 1, 1965, Respondent Ehlers has operated as an authorized dealer for the retail sales and service of Cadillac motor vehicles at such location. Respondent Thomas is, and has been since June 1, 1965, the successor to General Motors at General Motors' location at 1076 West Seventh Street, Los Angeles, California.

Respondent Thomas, in the course and conduct of its business operations, in the 12-month period ending June 1, 1966, will do a gross volume of business in excess of $500,000, and will, during the same period, purchase and receive goods valued in excess of $50,000 directly from suppliers located outside the State of

California. Respondent Thomas is, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organizations

The Machinists and the Painters are labor organizations within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

A. Statement of pertinent facts

Until May 28, 1965, General Motors operated branch retail stores for the sale of Cadillac motor vehicles, parts and accessories and the service of such vehicles at 1076 West Seventh Street and 5151 Wilshire Boulevard, Los Angeles, California.[1] The West Seventh street branch commenced business in 1949. The Wilshire Boulevard branch opened in 1954. In the operation of these branches General Motors' relation to the general public was substantially the same as that of any dealer authorized by General Motors[2] to engage in the sale and service of new Cadillac motor vehicles.

On August 1, 1957, International Association of Machinists, for and in behalf of District Lodge #94, Local #1086, AFL-CIO, after a representation election was certified for the following unit of General Motors' employees at its West Seventh Street and Wilshire Boulevard branches:

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[1]General Motors also operated a used car lot at 501 Vermont Street, Los Angeles, which was discontinued on May 28, 1965.

[2]General Motors through its Cadillac Division manufactures and assembles Cadillac motor vehicles, at Detroit, Michigan, which are offered to the general public through franchised dealers. The Respondents are among its franchised dealers.

> All employees, excluding all new and used car salesmen, service salesmen, office clerical employees, shop clerks, pick-up drivers—parts, and pick-up and delivery man, and guards, supervisors and professional employees as defined in the Act.

A collective-bargaining agreement was executed between General Motors and the Machinists on October 17, 1957. The agreement by its terms continued "in full force and effect without change until October 17, 1958." Painters were included under the Agreement.

On November 6, 1958, after a representation election the Automotive, Marine, Production Finishers, Equipment Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paperhangers of America, AFL-CIO, was certified for the following unit of General Motors' employees at its West Seventh Street and Wilshire Boulevard branches:

> All employees employed in the classification "painter" excluding all foremen and other supervisors within the meaning of the amended Act; all guards and professional employees within the meaning of the amended Act; all office clerical employees and all other employees and all other employees not specifically included in the unit.

The current collective-bargaining agreement was executed by and between General Motors and both certified Unions on December 1, 1964. By its terms the agreement continues "in full force and effect without

change until December 1st, 1967."[3] (Emphasis added) In the agreement General Motors recognized the Machinists for a unit of employees embracing the West Seventh Street and Wilshire Boulevard branches as follows:

> All mechanics, polishers, washers, lubricators, garage attendants, body and fender men, machinists, elevator operators, trimmers, and maintenance but excluding branch manager, assistant branch manager, sales manager, used car manager, service manager, assistant service manager, parts manager, assistant parts manager, general foreman, foreman, assistant foreman, inspectors, timekeepers, shop clerks, service salesmen, office clerical employees, new and used car salesman, tower operator, pickup drivers-parts, pick-up and delivery men,[4] guards, operating engineers, supervisors, clerical employees, G.M. Tech students, and work dispatchers.

In the same agreement General Motors recognized the Painters for a unit of employees embracing the West Seventh Street and Wilshire Boulevard branches as follows:

> All painters excluding branch manager, assistant branch manager, sales manager, used car manager, service manager, assistant service manager, parts

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[3]The agreement also provided that if either party failed to give notice to terminate or modify the agreement, "the Agreement shall continue in effect from year to year after December 1st, 1967, subject to termination by either party on 60 days' written notice prior to December 1st of any subsequent year."

[4]Although excluded from the unit description pick up and delivery men were included, in fact, in the coverage of the agreement.

manager, assistant parts manager, general foreman, foreman, assistant foreman, inspectors, timekeepers, shop clerks, parts clerks, service salesmen, office clerical employees, new and used car salesmen, tower operator, pick-up drivers-parts, pick-up and delivery men, guards, operating engineers, supervisors, clerical employees, G.M. Tech students and work dispatchers.[5]

Among other things the Agreement provided for voluntary dues deduction and that an employee who was a member of the Union upon the effective date of the Agreement "shall continue membership in the Union for the duration of [the] Agreement." Employees who were not members of the Union at the time the Agreement became effective were required to become members of the Union "within ten (10) days after the thirtieth (30th) day following the effective date of [the] Agreement or within ten (10) days after the thirtieth (30th) day following employment whichever [was] later." Compliance with these conditions required "paying an initiation fee and the membership dues uniformly required as a condition of acquiring or retaining membership in the Union."

The Agreement provided for the referral of certain grievances[6] to an "impartial umpire" from whose deci-

[5]The units are sometimes referred to herein as the "contract units."

[6]The Agreement provides "It shall be the function of the Umpire, after due investigation and within thirty (30) days after submission of the case to him, to make the decision in all claims of discrimination for union activity or membership, and in all cases of alleged violation of the terms of this Agreement or supplements thereto in regard to recognition, representation, grievance procedure, seniority, disciplinary layoff and discharge,

sion "[t]here shall be no appeal" and whose decision "will be final and binding on the Union and its members, and the employee or employees involved and the Company." The Agreement also contained a no-strike clause.

On January 12, 1965, General Motors advised the Unions by letter that it was in the process of reconsidering its policy of operating its own Cadillac agencies and that it was contemplating the transfer of its West Seventh Street and Wilshire Boulevard branches to independent dealers. On May 10, General Motors advised the Unions by letter that the Respondent Thomas and the Respondent Ehlers would take over the West Seventh Street branch and the Wilshire Boulevard branch respectively on June 1, 1965. Thereafter the Unions, by their attorneys, addressed letters to the two Respondents. By letter dated May 17, 1965 the Unions requested the Respondent Thomas to meet with their representatives on May 24, 1965, at 10 a.m.[7] By letter dated June 3, 1965, the Unions requested Respondent Thomas to "submit to arbitration the question of whether it was bound under the terms of any labor

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working hours, leaves of absence, union bulletin boards, strikes and stoppages, vacation pay, holiday pay, Article X, Sections 2, 3, 4 and 5, and any alleged violations of written local or national agreements. . . . Any case appealed to the Umpire on which he has no power to rule shall be referred back to the parties without decision."

[7]The letter in part stated, "The employees at the Wilshire branch (by letter dated May 18, 1965, such reference was corrected to refer to the West Seventh Street branch) and the above unions are concerned that this change of ownership will not adversely effect them. . . . In order to clarify the rights of the employees and above unions, and to deal with any questions that may arise on the part of all parties concerned, we are requesting a meeting at your very earliest convenience. . . ."

agreement with the Machinists and Painters Unions." Respondent Thomas failed to respond to the requests.

By a letter dated May 19, 1965, the Unions requested Respondent Ehlers to meet with their representatives "on Friday afternoon, May 21, 1965, on Monday, May 24, at 3 p.m., or thereafter."[8] By letter dated June 3, 1965, the Machinists requested Respondent Ehlers to "arbitrate the question as to whether the existing contract is binding upon him" and by letter dated June 8, 1965, the Painters requested that the "application of the Agreement" to Ehlers be submitted to arbitration in accordance with the Agreement. Ehlers declined the Unions' request for arbitration; nor did it recognize and bargain with the Unions.

Shortly prior to May 28, 1965, General Motors employed 117 employees in the contract units, sometimes referred to as the service departments. Of these employees 75 were employed at the West Seventh Street branch and 42 at the Wilshire Boulevard branch.[9] Each branch was supervised by a branch manager who reported to the Los Angeles branch manager. The Los Angeles branch manager was the highest local authority over the two branches and reported directly to the Cadillac Division in Detroit, Michigan. The Los Angeles

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[8]The letter in part stated, "In order to clarify the rights of the employees and above unions, and to deal with any questions that may arise on the part of all parties concerned, we are requesting a meeting at your earliest convenience."

[9]At the Wilshire Boulevard branch all employees represented by the Machinists were members of the Machinists except one employee. All employees represented by the Painters were members of the Painters. At the West Seventh Street branch all employees represented by the Machinists were members of the Machinists except two employees. All employees represented by the Painters were members of the Painters except one employee.

branch manager was located at the West Seventh Street store as were the controller, the purchasing agent, the personnel manager, the supervisor of accounting, the used car manager and credit manager. Some of these employees were carried on General Motors' Detroit payroll. While there were apparent interrelationships between the operations of the West Seventh Street and the Wilshire Boulevard branch, J. R. Toombs, supervisor of accounting for General Motors, testified that he recalled but one instance in his 15½ years of employment where there had been an interchange of an employee between the two branches. Each of the service departments were assigned separate services managers and new employees were hired by the service supervisors of the respective branch for their departments. Separate balance sheets were kept for each branch. Inter-branch accounts were maintained for transactions between branches. Each branch possessed independent performance capability and was self-contained and self-supporting from the standpoint of equipment, tools and other materials. Each branch had its own complement of employees and supervisors. Separate payrolls were kept at each branch and each branch maintained its own timeclocks and timecards. The premises occupied by each branch was separately leased.

Commencing in March 1965,[10] LaRue Thomas began negotiating with General Motors relative to procuring a franchise for the West Seventh Street branch and relative to purchasing certain designated assets of General Motors at its West Seventh Street branch. During

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[10]The initial contracts were between LaRue Thomas and General Motors. Later LaRue Thomas assigned his interest to Respondent Thomas.

the negotiations LaRue Thomas was apprised by General Motors that a labor agreement was in existence between General Motors and the Unions, but was advised by General Motors that there were no successor rights in the Agreement and that Thomas would not be bound by it.

On May 11, 1965, General Motors and LaRue Thomas executed a buy and sell agreement wherein among other things it was agreed that:

(1) General Motors would discontinue all of its Cadillac retail sale and service operations conducted at the West Seventh Street branch and execute with Thomas a "Cadillac Direct Dealer Selling Agreement" with a term of 5 years.

(2) General Motors would lease or sublease the premises occupied by the West Seventh Street branch.

(3) Unamortized leasehold improvements would be assumed by Thomas.

(4) Thomas would purchase:

(a) General Motors' fixed assets including machinery and shop equipment, parts and accessory equipment, furniture and fixtures and service cars.

(b) Company cars used for demonstration purposes and used cars used or acquired by General Motors in connection with its branch operations.

(c) All new and unused Cadillac motor vehicles.

(d) All unused and undamaged Cadillac parts.

(e) All unused and undamaged Cadillac accessories.

(f) All other unused and undamaged Cadillac parts and accessories.

(g) Special tools.

(h) Gas, oil and grease, new tires and tubes.

(i) Paint materials.

(j) Undercoating.

(k) Miscellaneous supplies and materials.

(5) Thomas would purchase all trade accounts receivable.

(6) General Motors would assign to Thomas "all the right, title and interest of [General Motors] in and to Sublet Repairs and Work-in-Process" at General Motors' branch operation.

(7) General Motors would assign all unfilled retail orders for Cadillac motor vehicles.

(8) Thomas agreed "to assume and discharge all liabilities with respect to warranties on new cars and to assume responsibilities for making policy adjustments on new cars delivered by [General Motors'] Branch Operations. . . .

The Direct Dealer Selling Agreement or Franchise Agreement referred to granted Respondent Thomas the "non-exclusive privilege of selling new Cadillac motor vehicles, parts and accessories. . . ." Among other things the Agreement required Thomas to furnish General Motors every month with an estimate of its requirements for new Cadillac motor vehicles for the next 3 months and "every ten (10) days with a sales report." Under the Agreement Thomas was required to set and maintain an "owned net working capital" satisfactory to General Motors. Thomas also was required to "provide satisfactory sales performance and render satisfactory service to owners" and "receive, investigate and handle all complaints received from owners of Cadillac motor vehicles with a view of securing and maintaining good will of the public toward Dealer, Cad-

illac and Cadillac motor vehicles". Unremedied complaints were to be reported promptly to General Motors. Thomas was restricted from making any "misleading statements or misrepresentation as to items making up the total selling price of a new Cadillac motor vehicle." Under the Agreement General Motors was entitled to an examination of Thomas' accounts and records "to assure the maintenance of an accounting system of a type designated" by General Motors. Respondent Thomas was required to maintain a standard product sign and a standard authorized service sign. The Agreement reserved to General Motors the right to terminate the Agreement if Respondent Thomas did not conduct its business in conformity with the requirements of the Agreement. Upon the termination of the Agreement Respondent Thomas was obligated to sell to General Motors all new and unused motor vehicles, all unused and undamaged Cadillac parts, all unused and undamaged Cadillac accessories and service supplies and certain signs. The Direct Dealers Selling Agreement could not be assigned by Thomas without the consent of General Motors.

General Motors also agreed to discharge its "obligations and liabilities to employees employed by [General Motors] at [its] Branch Operation for vacations, vacation pay, and pay in lieu of vacation accruing through the periods of employment expiring on the closing date."[11] On June 1, 1965, General Motors assigned to the Respondent Thomas, by separate instrument, Accounts Receivable, Unfilled Retail New Car Orders with Customers Cash Deposits thereon, Sublet Repairs and

[11]On June 7, 1965, LaRue Thomas assigned his interest to the Respondent Thomas.

Work-in-Process and prepaid taxes. A Bill of sale was also executed on June 1, 1965 for the items mentioned in the Agreement of May 11, 1965, and the other provisions of May 11 agreement were complied with.

Respondent Thomas commenced operation of the Sales Department on June 1, 1965, and of the Service Department June 7, 1965, at the West Seventh Street branch and established its own salaries, wages, hours and working conditions unrelated to those of General Motors. All the service employees employed by General Motors in the contract units at the West Seventh Street branch were interviewed for employment by the Respondent Thomas and each submitted application for employment. Out of 63 employees hired for the service department 16 were former General Motors' employees; 1 had been in the Painters' unit, the others had been in the Machinists' unit. Two General Motors employees were disqualified for employment because they had reached the age of 64 years. According to LaRue Thomas employees were hired on the basis of their ability. Out of a service supervisory staff of 7, on June 7, 1965, 3 had been service supervisors for General Motors. A used car salesman for General Motors became an assistant used car manager for Respondent and General Motors' supervisor of Accounting became Respondent Thomas' business manager.

Since June 1, 1965, Respondent Thomas has operated the West Seventh Street branch and has been engaged in substantially the same business operations formerly engaged in at such branch by General Motors.

The Unions commenced picketing Respondent Thomas on June 7, 1965.

Lou Ehlers testified that in his first discussions in Detroit in March 1965 about the possibility of obtaining a Cadillac dealership in Los Angeles, he was advised that General Motors had a union agreement in its Los Angeles establishment. He was not told that the contract would become binding upon him if he took over operation of the branch. Ehlers learned prior to May 12, 1965, that the Union's agreement did not contain a successor and assigns clause. He was advised by counsel, that the labor agreement between General Motors and the Union would not be binding upon him.

On May 12, 1965, Louis W. Ehlers entered into a buy and sell agreement with General Motors relating to the Wilshire Boulevard branch. The Agreement and the details of its implementation were substantially the same as the transactions between General Motors and LaRue Thomas described above. Ehlers consummated the deal as of June 1, 1965, and an assignment to Respondent Ehlers was executed on June 7, 1965.

Respondent Ehlers commenced its operations on June 1, 1965, at the Wilshire Boulevard branch. It established its own salaries, wages, hours and working conditions unrelated to those of General Motors.

All the in-unit employees made application for jobs. These employees were reviewed for hire by General Motors Wilshire service manager Balsemann and General Motors Wilshire foreman Graham, with the object of selecting the most competent and satisfactory persons. Of the 35 service employees employed by Ehlers in June, Graham hired 11 former General Motors employees. Respondent Ehlers hired a total of 87 employees, including management and supervision, of whom 54 had

formerly been employed by General Motors at the Wilshire Boulevard branch, Ehlers' managers were Lou Ehlers as manager, two men who had worked with him at another location as general sales manager and as business manager, and a new car sales manager, a former General Motors Wilshire employee. In respect to the service department, the service manager and foreman were different individuals than those who were employed in such capacity by General Motors; however, one of them had previously worked at the Wilshire Boulevard branch. Some General Motors' work in process was completed by Respondent Ehlers.

Since June 1, 1965, Respondent Ehlers has operated the Wilshire Boulevard branch and has been engaged in substantially the same business operations formerly engaged in at such branch General Motors.

The Unions commenced picketing Respondent Ehlers on June 9, 1965.

B. Concluding Findings

First: The General Counsel contends that each Respondent is "the successor, pro tanto," of General Motors and obligated to recognize and bargain with the Unions. The crucial question in this regard is "whether the employing industry remains essentially the same after the transfer[12] of ownership." N.L.R.B. v. Auto Ventshade, Inc., 276 F. 2d 303 (C.A. 5).

In N.L.R.B. v. Colten, 105 F. 2d 179, 183, Judge Simons wrote:

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[12]Whether a transfer of ownership is or is not "a bona fide business transaction carried out at 'arm's length'" is immaterial in the consideration of this question. N.L.R.B. v. Tempest Shirt Manufacturing Co., 285 F. 2d 1 (C. A. 5).

> It is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace. . . . It needs no demonstration that the strike which is sought to be averted is no less an object of legislative solicitude when contract, death, or operation of law brings about change of ownership in the employing agency."[13] (Emphasis supplied)

The "employing industry" as it existed before the acquisitions of the Respondent employers consisted of the operation of enterprises for the sale of Cadillac motor vehicles, parts and accessories and the service of such vehicles at 1076 West Seventh Street and 5151 Wilshire Boulevard, Los Angeles, California. After the successions these enterprises were continued at the same locations without substantial change, with the performance of substantially the same work by former General Motors employees.[14] Any deviations from the precise practices or procedures of General Motors effected by the Respondent Employers when they assumed operations were not of such a nature as to destroy the continuity and identity of the employing enterprise or alter the basic similarity of the Respondent employers' operations from those of General Motors. Moreover, by the Di-

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[13]The quoted language above from the Colten case has been often repeated by the Board. Weinberger Banana Company, Inc., 18 NLRB 787, 792; The Baldwin Locomotive Works, 20 NLRB 1100, 1110, Hooser Veneer Company, 21 NLRB 1697, 1700, and McCarron Co., 100 NLRB 1537, 1543.

[14]Although the Respondent employers put to work former employees of General Motors, under Chemrock Corp., 151 NLRB No. 111 it would appear that such fact need not be proved to establish a successorship.

rect Dealers Selling Agreement General Motors assured a continuation of the operations of the two branches along lines compatible with General Motors' directions and prior policies. The employing enterprise remained as before the acquisitions, i.e., the sale of Cadillac motor vehicles, parts and accessories and the service of such vehicles. The employing structure remained the same. Cf. Witham Buick, Inc., 139 NLRB 1209; Arbor Chevrolet Company, 93 NLRB 1376.

In Randolph Rubber Co.,[15] 152 NLRB No. 46, the Board has recently said:

> It is settled that, where there is a substantial continuity in the identity of the employing enterprise, the purchasing employer is bound to recognize and bargain with the incumbent union. In this case, Respondent took over the plant, machinery and the entire workforce[16] of the Rubber Corporation, and continued the same type of business activity—the manufacture of canvas shoes. While Respondent

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[15]In Randolph Rubber Co., supra, the union was certified in November 1953. The successor employer took over operations of the Company on November 8, 1963. A labor agreement was in effect with did not expire until 1966. Dues were deducted by the predecessor for the first week in November 1963. There was no claim that the successor employer was the alter ego of the predecessor employer.

[16]In Chemrock Corp., supra the Board said:

> "We think where, as here, the only substantial change wrought by the sale of a business enterprise is the transfer of ownership, the individuals employed by the seller of the enterprise must be regarded as 'employees' of the purchaser as that term is used in the Act. Such individuals possess a substantial interest in the continuation of their existing employee status, and by virtue of this interest bear a much closer economic relationship to the employing enterprise than, for example, the mere applicant for employment in the Phelps Dodge case." [Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177.]

introduced improved machines and techniques, made changes in the managerial staff, used its own trademarks, and acquired new customers, these factors did not appreciably alter the basic similarity of Respondent's operation to that of the Rubber Corporation. Upon the entire record, we find a continuity in the employing enterprise which obligated the Respondent as successor to Rubber Corporation to bargain with the Union as the incumbent representative of the employees when it assumed control of the plant in November 8, 1963.

As in the Randolph Rubber case, the continuity in the employing enterprise in the present case obligated the Respondent employers as successors to General Motors to recognize and bargain with the Unions as incumbent representatives of the employees in the unit herein found to be appropriate (see infra.) when they respectively assumed operation of the General Motors' sales establishments. See also Chemrock Corp., supra; Maintenance Inc., 148 NLRB 1299; Johnson Ready Mix Company, Inc., 142 NLRB 437; Downtown Bakery Co., 139 NLRB 1352; Witham Buick, Inc., supra; Ugite Gas Incorporated, 126 NLRB 494; Southerland's Tennessee Company, Inc., 102 NLRB 1178; and The Northwest Glove Co., Inc., 74 NLRB 1697.

Nor is the Trial Examiner persuaded that the Respondent employers are absolved from the obligations which attach to a successorship where there is a substantial continuity in the identity of the employing enterprise because the Respondent employees' predecessor was General Motors, a gigantic corporate enterprise, rather than a smaller employer such as the Respondents, or because separate successors purchased

simi-autonomous enterprises, for, under the circumstances present here "the interest of industrial peace" is as pronounced as in those kinds of successorships which have warranted the Board's concern and the imposition of the obligation to bargain. The fact that picket lines resulted from the Respondent employers' failure to deal with the Unions is evidence that such conduct was and is a source of industrial strife and was incompatible with the ends sought to be accomplished by the "application of the settled rule that the industrial strife that the Act seeks to avoid or mitigate, and the validly instituted bargaining relationship it seeks to foster, are no less an object of legislative solicitude where contract, death or operation of law brings about a change of ownership in the employing agency.'" See Miller Lumber Co., 90 NLRB 1361, 1362. Moreover, to hold the Respondent employers as successors and bound to recognize and bargain with the Union, under the facts herein, not only will foster a validly instituted bargaining relationship but will substitute collective bargaining for economic warfare[17] and tend toward the encouragement of the practice and procedure of collective bargaining. Cf. Phelps-Dodge Corp. v. N.L.R.B., 313 U.S. 177, 182.

Second: The General Counsel maintains that Respondent's Thomas and Ehlers violated Section 8(a)(1) and (5) of the Act by refusing "to honor or give effect to the collective-bargaining agreement" between General Motors and the Unions executed on December 7, 1964, effective through December 1, 1967, and from

[17]In N.L.R.B. v. Lion Oil Co., 352 U.S. 282, 289 it was said that a purpose of the Act was "to substitute collective bargaining for economic warfare. . . ."

year to year thereafter, if not modified or terminated. The General Counsel grounds this conclusion upon the Supreme Court's decision in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543. General Counsel also cites Wackenhut Corporation v. International Union, United Plant Guard Workers of America, 332 F. 2d 954 (C.A. 9) and United Steel Workers of America v. Reliance Universal, Inc., 335 F. 2d 891 (C.A. 3). The Respondents strongly urge that these cases lend no support to the General Counsel's thesis.

The General Counsel cites no Board decisions in support of his contention. However, in K. B. & J. Young's Super Market, Inc., 157 NLRB No. 17, a Trial Examiner found that a Respondent employer's refusal to honor the contract between its predecessor and the incumbent union constituted a violation of Section 8-(a)(5) of the Act. Nevertheless, the Trial Examiner did not affirmatively order the Respondent to honor the contract to which the General Counsel excepted. In a footnote the Board said:

> In the circumstances of this case, and particularly because the union gave notice, pursuant to the provisions of the contract in question, of its desire to reopen the contract, and the union has not excepted to the Trial Examiner's failure to order the Respondent to honor the contract, we find it unnecessary to pass upon the question of whether the Respondent also violated Section 8(a)(5) of the Act by its refusal to honor its predecessor's contract."

The implication seems strong that had the facts been otherwise the Board would have found an 8(a)(5) vio-

lation in the Respondent employer's failure to honor the contract.

In the case of California Footwear Company, 114 NLRB 765, affirmed; N.L.R.B. v. Lewis, 246 F. 2d 886 (C.A. 9) the Board held that the Respondent employer's refusal to apply a bargaining agreement, its unilateral establishing of wages and working conditions which differed substantially from those required by the bargaining agreement and its refusal to recognize the Union as the representative of the employees of the alter ego successor constituted a refusal to bargain with the Union. The Board further found that the contract remained in effect until it could be lawfully terminated in accordance with the requirements of Section 8(d) of the Act. See also Butler Chemical Company, 116 NLRB 1041.[18]

In the Wiley case the Supreme Court held "that the disappearance by merger of a corporate employer which has entered into a collective-bargaining agreement with a union does not automatically terminate all rights of employees covered by the agreement, and that, in appropriate circumstances, . . . the successor employer[19]

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[18]While the California Footwear Company case, supra, and the Butler Chemical Co. case, supra, concerned alter ego circumstances, it has been pointed out in N.L.R.B. v. Tempest Shirt Manufacturing Co., supra, that it is "immaterial" whether or not the succession is "a bona fide business transaction carried out at 'arms length.'" In view of the fact that the Act seeks to avoid or mitigate industrial strife and to foster validly instituted bargaining relationships, there is no convincing basis for treating "arm's length" successions any differently than "alter ego" or "disguised continuance" successions where the applicability of a predecessor's contract to his successor is concerned. Cf. Alexander Milburn Co., 78 NLRB 747, 750.

[19]The Supreme Court's use of the term "successor employer" suggests that the Supreme Court intended that its decision cover "successorships" as well as "merger cases."

may be required to arbitrate with the union under the agreement."

In United Steel Workers of America v. Reliance Universal, Inc., supra, relying on the Wiley case, the Court held that the "collective bargaining agreement, as an embodiment of the law of the shop, remained the basic charter of labor relations . . . after the change of ownership." The action concerned a successorship in which the incumbent union sought a declaratory judgment that the successor was bound by the predecessor's agreement and was obligated to arbitrate alleged grievances arising under the agreement.

In the Wackenhut Corporation case, supra, the court opined:

> . . . the policy of the national labor laws obligates Wackenhut as the successor employer, to honor the collective bargaining agreement entered into by its predecessor, General Plant.

Referring to the Wiley case, supra, the Court commented:

> Having in view the objectives of national labor policy reflected in established principles of federal law, the Court held the described interest of the employees [the protection to employees covered by a collective bargaining agreement from sudden change in their employment relationship] outweighs that of the employer and must prevail.

The Court held:

> It follows that under the rule of Wiley, Wakenhut is bound by the collective bargaining agreement entered into by General Plant and bound thereunder to arbitrate the union grievances as ordered by the District Court.

Hence the Trial Examiner finds that Respondents Thomas and Ehlers are "bound by the collective bargaining agreement entered into by [General Motors]."[20] Such finding is wholly in harmony with the Supreme Court's teaching in the Wiley case:

> "The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces.'"[21]

Nor may the teachings of the Wiley case be rejected as inapplicable to the present case because it arises under the National Labor Relations Act, as amended, rather than pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185 since a dominating purpose of the National Labor Relations Act, as amended, is likewise the avoidance of industrial strife. Cf. Synco Machine Company, Inc., 62 NLRB 985.

To hold that a successor is not bound that its predecessor's contract is to compel employees to resort to industrial strife to protect benefits which have accrued to them in the employing industry during the period of the predecessorship. Moreover, if such were the case, an expedient is afforded whereby employers through the sale and transfer of assets may not only avoid a con-

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[20]Obviously, disputes as to the specific application of the provisions of the agreement are left for resolution to the methods provided for in the Agreement, one of which is arbtration.

[21]The Trial Examiner's finding also concurs with the underlying objectives of the national labor relations laws "to promote collective bargaining and to help give substance to such agreements through the arbitration process." Carey v. Westinghouse Electric Corporation, 375 U.S. 261, 265.

tinuance of their own contractual obligations but can assure to thiir successors likewise escape from such obligations. Under such a rule of law unions are encouraged to strike against the predecessor employer prior to the succession and to erect defensive roadblocks in the paths of the peaceful transition of the employing industry from predecessor to successor. Such consequences are incompatible with the Act's desired results.[22] Moreover, under such circumstances, through the happenstance of succession, employees are exposed to the loss of seniority,[23] accrued employment benefits and job security. Furthermore, employees who have reached an age[24] when their employment is not attractive to employers but whose qualifications for employment otherwise would be suitable, may be cast upon a labor market to flounder about with a strong probability that they will continue unemployed and the dregs of the labor market. Such unhappy results do violence to the humanitarian objectives of the Act and the teachings of the Court to the end that employees may be protected "from a sudden change in the employment relation-

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[22]Section 1 of the Act states "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions [industrial strife and unrest] to the free flow of commerce."

The Supreme Court has said in Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 104:

> The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the Federal scheme to promote industrial peace.

[23]"Seniority has become of overriding importance. . . ." Humphrey v. Moore, 375 U.S. 335, 346.

[24]The Respondent Thomas disqualified two General Motors employees for hire because they had reached the age of 64 years.

ship."[25] Surely such a strained construction of the Act ought not to be indulged unless clearly compelled by the Act. Indeed the record is barren of any competent or persuasive proof that had the Respondents Thomas and Ehlers adhered to General Motors' collective-bargaining agreement detriment to them would have occurred or that General Motors employees would have been unable to perform the tasks assigned to them.[26] The language of Zdanok v. Gidden[27] Co., 288 F. 2d 99 (C.A. 2) is apposite:

> In the circumstances, no detriment to the defendant would have resulted from a recognition by the defendant of rights in its employees corresponding with their reasonable expectations. In that situation, a construction of the contract which would disappoint those expectations would be irrational and destructive.

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[25]In the Wackenhut case, the court said:

> What the Supreme Court did in Wiley was to balance the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers against the necessity of affording some protection to the employees covered by a collective bargaining agreement containing an arbitration clause, from a sudden change in the employment relationship. Having in view the objectives of national labor policy reflected in established principles of federal law, the court held the described interest of the employees outweighs that of the employer.

[26]Had General Motors employees been incapable of performing the tasks assigned to them, the Respondent employers could have sought relief under the terms of the labor agreement.

[27]The Glidden case, supra, involved a plant transfer. The employer refused to transfer certain employees to the transferred plant. Even though the collective-bargaining contract had expired the court held that the seniority rights had "vested" and "could not be unilaterally annulled." This decision demonstrates the utmost importance attached to accrued seniority rights.

In view of the teachings in the Wiley case and the Wackenhut Corp. case the "reasonable expectations" of the employees in the present case anticipated a continuation of the collective-bargaining agreement into the successorship.[28]

Accordingly by withdrawing recognition during the term of the contract and repudiating it in its entirety the Respondents Thomas and Ehlers unlawfully refused to bargain with the Unions.[29] Likewise, the Respondents' unilateral changes in working conditions in derogation of the terms of the contract were a violation of Sections 8(a)(5) and 8(d) of the Act, California Footwear Co., supra; Cf. C & S Industries, Inc., 158 NLRB No. 43.

Third: As noted above the Board certified the Machinists and the Painters for multibranch or establishment units of employees covering General Motors' West Seventh Street and Wilshire Boulevard establishments which unit descriptions were incorporated into labor agreements without substantial variance. There seems little question that on May 11 and 12, 1965, the dates upon which the buy and sell agreements were signed and Respondents became committed to operate the establishments under General Motors franchises, these

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[28]It is noted that the General Motors agreement contained no provision for its termination in event the employing industry was transferred to a successor.

[29]See Hexton Furniture Co., 111 NLRB 342, 344; California Footwear Co., supra; The Butler Chemical Co., 118 NLRB 1041; Royal Cotton Mill Company, Inc., 109 NLRB 186; Sanson Hosiery Mills, Inc., 92 NLRB 1102. In the Hexton Furniture Co., supra, the Board held that "by withdrawing recognition from the union during the middle of the contract term, the Respondent unlawfully refused to bargain with the Union."

units were appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.[30] Not only were these units certified units[31] but a controlling history of bargaining in such units had been well established. The Trial Examiner finds that at the time of the succession these units were appropriate units for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The multiestablishment units, except for the fact of succession, remained unchanged in any appreciable aspect after the acquisitions. Moreover, the certification of the Unions for such units ran "with the employing industry and [was] binding on [the] bona fide successor company as well as on its predecessor." The Northwest Glove Co., Inc., supra, 1700. The Board in the Northwest Glove case further opined,

> By its very nature and purpose it [the obligation to bargain] ran with the business; and it is therefore binding on the successor corporation which, with knowledge of its predecessor's obligation to bargain, took over and continued the business.

The obligation to bargain which survived the succession a force was the obligation to bargain within the appropriate unit existing at the time of the succession. Not only were the Respondent employers charged with the knowledge of this obligation but each employer had

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[30]Respondent Ehlers in its Brief states at page 12:

> The Unions were recognized by G.M. in a multi-plant unit. In view of the 1957 certification and seven years of bargaining on such basis, that is clearly the established unit.

[31]"The Board's determination of the appropriate bargaining unit should not be lightly set aside. Packard Motor Car Co. v. N.L.R.B., 330 U.S. 485." N.L.R.B. v. Sheridan, 61 LRRM 2586 (C.A. 2).

actual knowledge of its predecessor's obligation to bargain within the multiestablishment units. Yet each employer in the face of such obligation to bargain concluded a buy and sell agreement with General Motors. Thus, having elected to buy into multibranch or establishment units, the Respondent employers stood in no different position than an employer who buys into a multiemployer unit. Cf. Downtown Bakery Corp., 139 NLRB 1352; K. B. & J. Young's Super Markets, Inc., supra. Moreover, when successor employers buy into multiestablishment units, as occurred in the present case, the stability of industrial relations which has been accomplished in such multiestablishment units and the collective and individual rights which have matured in such multiestablishment units warrant a finding that the successor employees are bound to bargain in such multiestablishment units in like manner as did their predecessor. The preservation of the status quo clearly outweighs a bifurcation of the multiestablishment units.

When Respondents Thomas and Ehlers bought into the multiestablishment units consisting of the two General Motors branches or establishments, they consented to participate in bargaining as it existed at the time of the purchase, that is, the Respondent Employers consented to be bound to bargain in the multiestablishment units. Cf. Southwestern Colorado Contractors Association, and its Members, 153 NLRB No. 75. The attempted withdrawals of Respondents Thomas and Ehlers from such multiestablishment units were untimely and ineffective. The Trial Examiner finds that the multiestablishment units continued as appropriate units for the purposes of collective bargaining after the succession and that the respondent employers are bound

to bargain collectively and jointly with the unions in such units.

Fourth: Both by reason of the successorship and the binding effect of the General Motors collective-bargaining agreement Respondent employers were obligated to recognize and bargain with the Unions in conformity with Section 8(a)(5) of the Act. The Respondents, nevertheless, claim that they are excused from this obligation in that they possessed a good faith doubt as to the Unions' majority status. While the Trial Examiner deems, a defense of the good faith doubt, under the circumstances of this case, immaterial in that the General Counsel was not required to reestablish the Unions' current majority status,[32] the record does not support a finding of such a defense for there is no competent proof that the Unions were not in fact the majority representatives during the critical period herein.

Immediately prior to the date of the succession and at the time the Unions attempted to initiate a collective-bargaining relationship, the vast majority of the employees in the contract units were paid up members either in the Painters or the Machinists respectively. Furthermore, the record is barren of any proof that these employees, who for a number of years had executed voluntary check-off authorizations, in fact, were other than voluntary members of the Unions.

In its brief the Respondent Thomas claims a good faith doubt as to the Unions' majority status in that: (1) General Motors employees when "interviewed by the

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[32]See Butler Chemical Company, supra, 1050, 1051; Hexton Furniture Company, supra; Randolph Rubber Company, Inc., supra.

service manager of Thomas none of them mentioned anything whatever about unionization or unions"; (2) "none of them at any time ever demanded that Thomas recognize the union as the bargaining agent"; (3) at no time did any of the employees demand or suggest that any contract that the Unions had with General Motors be applicable to or binding on Thomas; (4) employees hired by Thomas failed to honor the Unions' picket line placed on June 7, 1965, and "the certifications of the Unions were in excess of seven years of age"; and no independent automobile dealership is organized in the Southern California area."

Respondent Ehlers in its Brief grounded its alleged good faith doubt of the Unions' majority status upon (1) at the time of the election in 1957 General Motors employees at Wilshire voted two to one against the Union; (2) "two of the former General Motors employees volunteered that they were going to drop their union card, and another applicant stated he would not accept employment if Ehlers was a union shop"; (3) "no other automotive shops in the area were organized"; (4) Ehlers' wages were considerably higher than those in the average shop and the working conditions were superior"; (5) "Ehlers was a small, local independent dealer"; (6) "not a single employee of Ehlers, including the former General Motors employees, expressed any desire to be represented by the Unions or either of them"; (7) none of the employees ceased working for Ehlers when the picket line appeared; (8) the Unions did not assert that a majority of Ehlers' employees desired to be represented by them or "file a petition for an election."

Whether a good faith doubt entered into the Respondent employers' decisions to refuse to recognize the Unions is highly speculative since both contend that it is neither a successor nor bound by the Unions' contract. The reasons advanced sound of post-rationalization in the nature of defenses advanced to support a position which would have been pursued in any event. Nevertheless, "an employer may lawfully refuse to bargain only if it can show by objective facts that it has a reasonable basis for believing that the union has lost its majority status since its certification." United States Gypsum Co., 157 NLRB No. 60. The Board added, "it is well settled that change of ownership alone will not be sufficient to justify a refusal on the part of the new employer to bargain with the certified representative of the employees."

In Laystrom Manufacturing Co., 151 NLRB No. 144, the Board rejected an alleged doubt as to the union's majority status based upon a turnover in employees, the absence of union animosity, or independent unfair labor practices, the filing of a petition for an election and the willingness to meet with the union for the limited purpose of trying to seek a conditional contract contingent on the outcome of the election. The reasons advanced by the Respondent employers in the instant case are of similar vein and and are for the most part self-serving assertions which do not provided any objective basis for doubting the Union's continuing majority."

Moreover, a good faith doubt as to the continued majority status of a union may not be bottomed upon a loss of majority which results from the activities of

the employer. Cf. Medo Photo Supply Corp. v. N.L.R.B., 321 U.S. 678, 687; Franks Bros. v. N.L.R.B., 321 U.S. 702.[33]

Had the Respondent employers honored their bargaining obligations which arose by reason of their successorship, as was stated in the Chemrock Corp. case, supra, the General Motors' employees "would not have been terminated without the protection afforded them through collective bargaining with their Union about their wages and the continuation of their employment" and "[t]hey would have retained their jobs at least until the Respondent had completely fulfilled its bargaining obligation, and it is well within the realm of possibility that as a result of such bargaining they might not have been terminated at all." Hence any alleged loss of majority may be attributed to the Respondent employers' refusal to assume their bargaining responsibilities, as successors. Furthermore, the Respondent employers' attitude toward recognition of the Union and its rejection of the established collective-bargaining relationship was a powerful deterrent against expressions of favor for the Union either on the part of former General Motors employees or newly hired employees. The Respondent employers, having demonstrated a rejection of the Union as a bargaining agent, could hardly expect employees of General Motors to step forward and declare their allegiance for the Unions when they did not know what criterion the Respondent employers were applying in selecting their employees.

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[33]In no event can the employer discredit a duly designated bargaining agreement by refusing to bargain with it and then avail himself of the bargaining agent's loss of majority which has thus been brought about by the employer's own conduct. N.L.R.B. v. George P. Pilling & Son Co., 119 F. 2d 32, 29.

Upon the basis of the record as a whole there is presented no competent or persuasive evidence which establishes that the Respondent employers possessed a reasonable basis for believing that the Union did not represent a majority of the employees in the contract units.

In a case concerning a successor employer, as here, fair play requires that we look to the time of the succession to determine the majority status of the Unions. Cf. N.L.R.B. v. Auto Ventshade, Inc., 276 F. 2d 303, 307 (C.A. 5). On May 11 and 12, 1965, Respondent Thomas and Respondent Ehlers respectively executed the buy and sell agreements with General Motors and upon such dates the Respondents respectively assumed the obligations of successors to the interests of General Motors, an event which marked the commencement of the succession. Thus, on such dates the Respondent's respective obligations to bargain arose and the Respondents became subject to the terms of the Agreement between their predecessor, General Motors, and the unions.[34] Upon such dates there is no doubt that the Unions represented a majority of the employees in the multibranch or contract units. To ignore these dates (May 11 and 12, 1965) and choose later dates upon which to determine the majority status of the Unions not only would invite the successor to adopt means for depleting the majority status but would allow the successor to subtly choose employees who were less likely to be union partisans and to choose enough new employees to exceed the number of the predecessor's employees hired.

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[34]No request by the Union was required to make the Union's unexpired agreement . . . binding on Respondent." K. B. & J. Young's Super Markets, Inc., supra.

Had the Respondent employers been inclined to accommodate the statutory purposes, the proper course would have been "to recognize the prima facie union representation of the employees and to continue to deal with the union, but petition the Board for a new election." N.L.R.B. v. Auto. Ventshade, Inc., supra 307. See also Brooks v. N.L.R.B., 348 U.S. 96, 103.[35] Having failed to follow this course the Respondent employers depicted a disregard for the Act's directives and the absence of a good faith doubt.

Upon the basis of the record as a whole the Trial Examiner finds that the Respondent employers' defense of good faith doubt as to the Unions' majority status is not well taken and that at all times critical herein the Unions represented a majority of the employees in the units found to be appropriate for the purposes of collective bargaining.[36]

IV. The effect of the unfair labor practies upon commerce

The activities of the Respondents set forth in section III, above, occurring in connection with their operations set forth in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

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[35]In the Brooks case the Supreme Court said, "If a employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief, while continuing to bargain in good faith at least until the Board has given some indictation that his claim [the union lacks majority status] has merit."

[36]". . . a state of facts once shown to exist is presumed to continue unless the contrary is demonstrated. . . ." Harbor Chevrolet Co., supra, 1340.

V. The remedy

It having been found that the Respondents have engaged in unfair labor practices, it will be recommended that they cease and desist therefrom and take the following affirmative action designed to effectuate the purposes of the Act.

The Respondents shall immediately initiate collective bargaining with the Unions as the exclusive representatives of their employees in the units herein found to be appropriate, and shall immediately honor and give effect to the collective-bargaining agreement between General Motors and the Unions dated December 1, 1964, and comply with its terms retroactively commencing May 29, 1965; however, in view of the fact that the Respondent employers may have instituted more favorable wages, hours of employment or other working conditions than those negotiated in the agreement, compliance with the terms of the agreement which will cause an abandonment of or a change in any such more favorable wages, hours of employment or other working conditions shall be conditioned upon the affirmative decision of the affected employees as expressed through their collective-bargaining representatives.[37]

The Respondents, pursuant to the seniority requirements of the above agreement, shall offer all former

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[37]See Beacon Piece Dyeing and Finishing Co., Inc., 121 NLRB 953, 963. It is not intended by the recommended remedy herein to limit the parties' recourse to free and voluntary collective bargaining (which is hereby encouraged) as a means of resolving the problems which confront the parties by reason of the succession of ownership from General Motors to the Respondents. Nor is it intended that the recommended remedy impinge upon or supplant the procedures established under the agreement in respect to the resolution of any controversies relating to the interpretation or application of the terms of the agreement.

General Motors employees immediate employment in the positions to which they are entitled under the terms of the agreement, dismissing, if required, any employee hired by the Respondents since the Respondents commenced operations as the successors to General Motors, and make them whole by payment to each of a sum of money equal to that which he or she normally would have earned had the Respondents complied with the seniority provisions of the agreement from the respective dates the Respondents commenced operations as successors to General Motors to the date of the offer of employment, less their net earnings, if any, during the said period. The relief thus provided for shall be computed in accordance with the formula set forth in F. W. Woolworth Company, 90 NLRB 289. Interest at 6 per cent per annum shall be paid in accordance with the principle of Isis Plumbing & Heating Company, 138 NLRB 716.

Conclusions of Law

1. The Unions are labor organizations within the meaning of the Act.

2. The Respondents are engaged in commerce within the meaning of Sections 2(6) and (7) of the Act.

3. All mechanics, polishers, washers, lubricators, garage attendants, body and fender men, machinists, elevator operators, trimmers, and maintenance men employed by Thomas Cadillac, Inc. at its 1076 West Seventh Street, Los Angeles, California, establishment and by Lou Ehlers Cadillac at its 5151 Wilshire Boulevard, Los Angeles, California, establishment, excluding branch manager, assistant branch manager, sales manager, used car manager, service manager, assistant service manager, parts manager, assistant parts manager,

general foremen, foremen, assistant foremen, inspectors, timekeepers, shop clerks, parts clerks, service salesmen, office clerical employees, new and used car salesmen, tower operator, pickup drivers-parts, guards, operating engineers, supervisors, clerical employees, G. M. Tech students, and work dispatchers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as amended.

All painters employed by Thomas Cadillac, Inc. at its 1076 West Seventh Street, Los Angeles, California, establishment and by Lou Ehlers Cadillac at its 5151 Wilshire Boulevard, Los Angeles, California, establishment, excluding branch manager, assistant branch manager, sales manager, used car manager, service manager, assistant service manager, parts manager, assistant parts manager, general foremen, foremen, assistant foremen, inspectors, timekeepers, shop clerks, parts clerks, service salesmen, office clerical employees, new and used car salesmen, tower operator, pickup drivers-parts, pickup and delivery men, guards, operating engineers, supervisors, clerical employees, G. M. Tech students, and work dispatchers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, as amended.

4. By refusing to recognize and bargain with the Unions as exclusive bargaining agents of employees in the appropriate units, the Respondent Thomas on and since May 11, 1965, and the Respondent Ehlers on and since May 12, 1965, have engaged in, and are engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act, as amended.

5. By refusing to honor and give effect to the collective-bargaining agreement between the Unions and

General Motors dated December 1, 1964, and by changing unilaterally working conditions in derogation of the terms of said agreement the Respondents, since May 29, 1965, have engaged in, and are engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (5), and 8(d) of the Act, as amended.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Sections 2(6) and (7) of the Act, as amended.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law and upon the entire record in this case, it is recommended that each of the respective Respondents, their officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain collectively and jointly with the International Association of Machinists, District Lodge 94, AFL-CIO, and the Automotive, Marine, Production Finishers, Equipment Maintenance and Public Service Painters, Local Union 1798, Brotherhood of Painters, Decorators and Paper Hangers of America, AFL-CIO, as the exclusive representatives of the employees in the appropriate units.

(b) Refusing to honor and give effect to the collective-bargaining agreement between said Unions and General Motors dated December 1, 1964.

(c) Changing unilaterally working conditions of their employees.

(d) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Immediately initiate collective bargaining jointly with said Unions as the exclusive representatives of the employees in the previously described appropriate units.

(b) Immediately honor and give effect to the collective-bargaining agreement between General Motors and the Unions dated December 1, 1964, and comply with its terms retroactively commencing May 29, 1965, in the manner set forth in the action above-entitled "The remedy."

(c) Offer, pursuant to the seniority requirements of the above agreement, all former General Motors employees immediate employment in the positions to which they are entitled under the terms of said agreement, dismissing, if required, any employee hired by the Respondents since the Respondents commenced operations as successors to General Motors and make them whole for any loss of pay they may have suffered, all in the manner set forth in the section above-entitled "The remedy."

(d) Notify the above-mentioned employees, if presently serving in the Armed Forces of the United States, of their right to employment upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(e) Preserve and make available to the Board and its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant or necessary to the determination of back-

pay due and to employment and related rights provided under the terms of this Recommended Order.

(f) Post at their respective establishments at Los Angeles, California, copies of the notice attached hereto and marked "Appendix."[38] Copies of said notice to be furnished by the Regional Director of the Thirty-first Region, shall, after being signed by a representative of the respective Respondent be posted immediately upon receipt thereof and maintained for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the aforesaid Regional Director, in writing, within 20 days from the date of this Decision, what steps the respective Respondent has taken to comply herewith.[39]

Dated at Washington, D.C., May 17, 1966.

/s/ LOWELL GOERLICH
Lowell Goerlich
Trial Examiner

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[38]If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

[39]If these Recommendations are adopted by the Board, this provision shall be modified to read "Notify the Regional Director for the Thirty-first Region, in writing, within 10 days from the date of this Order, what steps the respective Respondent has taken to comply herewith."